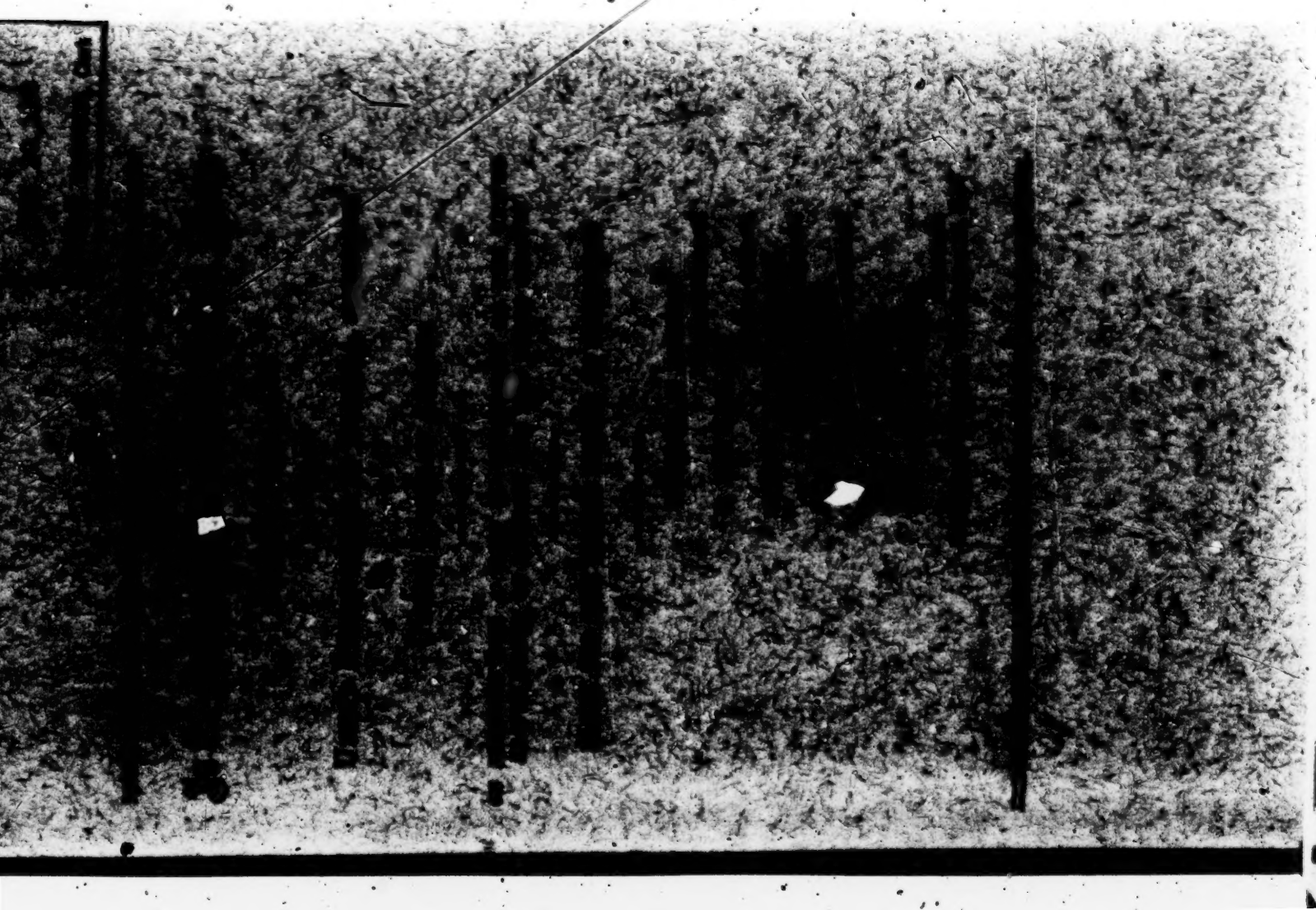

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
1. The nature of the litigation	3
a. The background	3
b. The District Court proceedings	5
2. The affidavits	6
a. The Government affidavits	7
(1) The steel industry and the strike	7
(2) The effect of the strike on the nation's defense	9
(3) The effect of the strike on the nation's economy	14
b. The union affidavits	17
c. Dr. Saulnier's affidavit	20
3. The findings of the District Court	23
4. The decision of the Court of Appeals	25
Argument	27
I. Section 208 of the Labor Management Relations Act of 1947 is constitutional	28
II. The concurrent findings of the courts below that continuance of the steel strike "will imperil the national health and safety" are fully supported	41
A. The national safety is imperiled by the direct effect of the strike in obstructing and delaying essential defense projects	43
B. The national health and safety is imperiled through the effect of the strike on the economy at large	46
III. To enjoin a strike imperiling the national health and safety the court is not required to find that the injunction will facilitate settlement of the labor dispute	52

Page

Conclusion 58
Appendix A 59
Appendix B 94

CITATIONS

Cases:

Aetna Life Ins. Co. v. *Haworth*, 300 U.S. 227 31
Chapman v. *Maren Elwood College*, 225 F. 2d 230 39
Chicago & G. T. Ry. v. *Wellman*, 143 U.S. 339 31
Chicago & Southern Air Lines v. *Waterman S.S. Corp.*, 333 U.S. 103 ..... 31, 39
Colegrove v. *Green*, 328 U.S. 549 30
Coleman v. *Miller*, 307 U.S. 433 30
Continental Grain Co. v. *Dant & Russell*, 118 F. 2d 967 40
Debs, In re, 158 U.S. 564 ..... 28, 37
Douds v. *Local 1250, Retail Wholesale Dept. Store Union*, 170 F. 2d 695 37
Frothingham v. *Mellon*, 262 U.S. 447 30
Georgetown v. *Alexandria Bridge Co.*, 12 Pet. 91 37
Goldhill Trading & Ship Co. v. *Caribbean Ship Co.*, 56 F. Supp. 31 40
Gordon v. *United States*, 117 U.S. 697 ..... 31, 39
Hayburn's Case, 2 Dall. 409 ..... 31, 39
Interstate Commerce Commission v. *Brimson*, 154 U.S. 447 ..... 37, 39
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 30
Kohl v. *United States*, 91 U.S. 367 35
Lord v. *Veazie*, 8 How. 250 31
Marine Transit Corp. v. *Dreyfus*, 284 U.S. 263 40
Muskrat v. *United States*, 219 U.S. 346 31
Nixon v. *Herndon*, 273 U.S. 536 30
Pennsylvania v. *The Wheeling &c. Bridge Co.*, 13 How. 518 37
Pierce v. *Society of Sisters*, 268 U.S. 510 30
Pope v. *United States*, 323 U.S. 1 39
Premier-Pabst Sales Corp. v. *Grosscup*, 298 U.S. 226 30
Red Cross Line v. *Atlantic Fruit Company*, 264 U.S. 109 40
Sanitary District v. *United States*, 266 U.S. 405 37
Siebold, Ex parte, 100 U.S. 371 ..... 30, 38

Cases—Continued Page
Swift & Co. v. *Hocking Valley Ry. Co.*, 243 U.S. 281 31
Tennessee Electric Power Co. v. *T.V.A.*, 306 U.S. 118 30
Tileston v. *Ullman*, 318 U.S. 44 30
Truax v. *Raich*, 239 U.S. 33 30
Tutun v. *United States*, 270 U.S. 568 30, 32, 33–34
Ullmann v. *United States*, 350 U.S. 422 36, 37
United States v. *Ferreira*, 13 How. 40 31, 39
United States v. *Johnson*, 319 U.S. 302 31
United States v. *Jones*, 119 U.S. 477 31
United States v. *Mine Workers*, 330 U.S. 258 29
United States v. *Swift & Co.*, 286 U.S. 106 40
United States v. *United Steel Workers of America*, 202 F. 2d 132, certiorari denied before judgment, 344 U.S. 915 28
Virginian Ry. v. *System Federation*, 300 U.S. 515 40
Willing v. *Chicago Auditorium Association*, 277 U.S. 274 31
Youngstown Co. v. *Sawyer*, 343 U.S. 579 29

Constitution and Statutes:
Constitution of the United States:
Article III, § 2 6, 28
Fifth Amendment 36
Act of June 30, 1952, 66 Stat. 305, 50 U.S.C. App. 2123 45
Defense Production Act of 1950, 64 Stat. 798, 50 U.S.C. App. 2061 45
Title V, Sec. 503, 50 U.S.C. 2123 45
Labor Management Relations Act of 1947, 61 Stat. 136, *et seq.*, as amended, 29 U.S.C. 176–180:
Sec. 1(b) 38, 55
Sec. 206 2, 4, 55, 94
Sec. 207 2, 94
Sec. 208 2, 5, 31, 32, 36, 38, 39, 43, 48, 51, 56, 95
Sec. 209 2, 96
Sec. 210 2, 96
National Labor Relations Act, Sec. 10(l), 29 U.S.C. 160 37
Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101–115 29

Miscellaneous:
96 Cong. Rec. 11630, 11750, 12175, 12905–6, 14073 45
98 Cong. Rec. 6598, 6600, 6601–4, 6613, 6615, 6616 (Senate debate); 8023–8050 (House debate) 45

Miscellaneous—Continued

	Page
Executive Order No. 10843	4
Executive Order No. 10848	4
H.R. 3020, 80th Cong., 1st Sess., Sec. 203(a)	47, 48
H. Conf. Rep. No. 510, 80th Cong., 1st Sess	55
Legislative History of the Labor Management Relations Act, 1947 (G.P.O. 1948), pp. 586-587, 669, 868, 882, 905, 913, 926, 1008, 1145, 1496, 1518, 1523	57
S. Rep. No. 105, 80th Cong., 1st Sess	29, 48, 57
S. Rep. No. 2250, 81st Cong., 2d Sess	45

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 504

UNITED STEELWORKERS OF AMERICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals for the Third Circuit (App. A, *infra*, pp. 59–93) are not yet reported. The Findings of Fact and Conclusions of Law entered by the District Court for the Western District of Pennsylvania appear at R. 244–248.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1959. The petition for a writ of certiorari was filed on October 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 208 of the Labor Management Relations Act of 1947, providing for injunctive relief

against continuation of a national strike imperiling the national health and safety, is valid under Article III of the Constitution.

2. Whether the concurrent findings of both courts below that continuation of the current nation-wide steel strike will imperil the national health and safety are correct on this record.

3. Whether Section 208 of the Labor Management Relations Act of 1947 authorizes a court to refuse to enjoin a national strike imperiling the national health and safety because of the absence of evidence sufficient to satisfy the court that the injunction will facilitate collective bargaining.

STATUTE INVOLVED

Sections 206–210 of the Labor Management Relations Act of 1947, 61 Stat. 136, 155, as amended, 29 U.S.C. 176–180, are set forth in Appendix B, *infra*, pp. 94–97.

STATEMENT

This suit was brought by the United States, under § 208 of the Labor Management Relations Act of 1947, 61 Stat. 155, 29 U.S.C. 178, to enjoin the continuation of the nation-wide steel strike. On October 21, 1959, the District Court for the Western District of Pennsylvania entered an order enjoining the strike until further order of the court, and directing the defendant union (the United Steelworkers of America) and the defendant steel companies to continue attempts to resolve their labor disputes by collective bargaining during the period of the injunction (R. 249–250).

The district court declined to stay the effectiveness of its injunctive order, but an interim stay was granted by Circuit Judge Staley to allow the union's request for a stay pending appeal to be considered by a full panel of the court of appeals on the following day (R. 253, 266–267). When the stay application came on for hearing, the appeal was, by agreement of counsel, argued and submitted on the merits (R. 280–281). The court continued the interim stay pending its decision (R. 282).

On October 27, 1959, the court of appeals affirmed the injunction, Judge Hastie dissenting (App. A, *infra*, pp. 60–93). By an equally divided court (Judge Kalodner not participating), the Third Circuit refused a rehearing *en banc* (App. A, *infra*, p. 59).

1. THE NATURE OF THE LITIGATION

A. THE BACKGROUND

On July 15, 1959, after the union and the steel companies had failed, following extended negotiations, to agree to the terms of new collective bargaining agreements, the union commenced a strike which has been in effect, without interruption, since that time. The union represents employees in the various productive facilities of the defendant companies involved in the different stages of steel production, *i.e.*, the mining and transport of iron ore by railroads or vessels, the operation of blast furnaces for the conversion of iron ore into pig iron, the production of steel ingots, the rolling and shaping of steel ingots into various shapes and forms of steel products, and the fabrication of certain finished products. The facili-

ties closed down because of the disputes and resultant strike constituted 85 per cent of the nation's steel production capacity.

On October 9, 1959, some three months after commencement of the strike, the President of the United States issued Executive Order No. 10843 (R. 9–10) whereby, pursuant to the provisions of § 206 of the Act, he appointed a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him. In the Executive Order, the President expressed the opinion that the strike, if permitted to continue, will imperil the national health and safety. In a statement explaining his issuance of the Executive Order, the President pointed to the "shutting off" of practically all new supplies of steel, the unemployment of hundreds of thousands of employees in steel and related industries, and the imminent threat to the economic health of the nation if production was not quickly resumed (R. 10).

On October 19, 1959,[1] the board of inquiry made its written report to the President (R. 11–33). Limiting its findings, under § 206, to a description of the facts of the dispute and of the parties' respective positions, the board concluded that "we see no prospects for an early cessation of the strike. The Board cannot point to any single issue of any consequence whatsoever upon which the parties are in agreement" (R. 28).

Upon receipt of the board's report, the President directed the Attorney General, in accordance with

[1] The board was originally directed to make its report on October 16, 1959, but the time was extended until October 19 by Executive Order No. 10848 (R. 11).

§ 208 of the Act, to petition the appropriate district court to enjoin continuance of the strike. In his communication to the Attorney General, the President reiterated his belief that the strike, if permitted to continue, would imperil the national health and safety (R. 8–9).

B. THE DISTRICT COURT PROCEEDINGS

On October 20, 1959, the Attorney General filed a petition in the United States District Court for the Western District of Pennsylvania, seeking an injunction against the union and the steel companies pursuant to § 208 of the Act (R. 1–7). The petition, describing the requisite statutory steps which had been taken by the President, alleged that prolongation of the widespread strike in the steel industry will imperil the health and safety of the country. In summary form, the petition briefly averred some of the already profound consequences of the strike on employment, both in the steel industry and many other areas of the economy, on the availability of essential steel products, and on vital national defense projects. It pointed to the acceleration of adverse effects which would inevitably result from a continuance of the strike.

In response, the union[2] denied that the strike, if permitted to continue, would imperil the national health and safety. In addition, the union, challenging the constitutionality of § 208, asserted that the Government's petition did not present a case or contro-

[2] The union was the only defendant to file a responsive pleading or to introduce evidence. The defendant steel companies waived this right (R. 34).

versy within the meaning of Article III, § 2, of the Constitution of the United States. Finally, the union pleaded that, even if the district court had jurisdiction, general principles of equity required that the relief sought by the Government be denied (R. 35–37).

2. THE AFFIDAVITS

All the evidence in the case consisted of affidavits filed by the Government (R. 161–200) and by the defendant union (R. 39–123) pursuant to stipulation (R. 34). The nine affidavits submitted by the Government represented the views of various cabinet officers and Government officials concerning the serious effects of the strike in those defense and non-defense areas over which they had authority and were kept informed. While the union filed seven affidavits, only four—those of Robert R. Nathan, Leon Keyserling, Meyer Bernstein and one of Otis Brubaker's—went to the issue of danger to the national health and safety, the other three being concerned solely with the labor disputes between the companies and union[4] and the retroactivity issue.[1] One of the nine Government affidavits, that of Raymond J. Saulnier, Chairman of the Council of Economic Ad-

[1] The union's answer also sought to have any injunction which might be issued provide that any new collective bargaining agreements entered into by the parties defendant should include a retroactivity provision. That issue is not involved here.

[4] The affidavit of David J. McDonald, President of the United Steelworkers of America (R. 39–66).

[5] The affidavit of I. W. Abel, Secretary-Treasurer of the United Steelworkers of America (R. 67–68), and one of the two affidavits submitted by Otis Brubaker, Research Director of the union (R. 117–122).

visors, was, in essence, a rebuttal affidavit to that of Mr. Nathan, and for this reason, will be described below after the other eight Government and the four union affidavits.

A. THE GOVERNMENT AFFIDAVITS

(1) *The steel industry and the strike*

The affidavits of Secretary of Commerce Frederick H. Mueller (R. 161–167) and Secretary of Labor James P. Mitchell (R. 172–173) described, in some detail, the vast, widely distributed, complex of productive operations making up the steel industry. Secretary Mueller noted that steel production encompasses production of iron ore, pig iron, steel ingots, and fabricated products and that the defendant steel companies own and operate, *inter alia*, steel mills, iron ore mines, coal mines, ore boats, limestone quarries, fabricating plants, and shipbuilding companies. The industry also produces valuable by-products that constitute raw materials for other basic industries, such as the coal, chemical, and cement industries (R. 161).

Both Secretaries Mueller and Mitchell observed that annual consumption of steel is far greater than that of all other metals combined (R. 161, 172). Annual steel consumption was estimated by Secretary Mueller to be 20 per cent in the construction and related industries, 25 per cent in the production of transportation equipment, 10 per cent in the manufacture of machinery and industrial, commercial and scientific equipment of various kinds, 10 per cent in

the manufacture of containers such as those used for food and medicines, 5 per cent in the manufacture of household appliances and furniture, 5 per cent in agriculture and the extractive industries including mining, oil and gas drilling, and lumbering, and the remaining 25 per cent in a variety of ways, including the production of ordnance and for military uses other than those in the other categories (R. 161–162).

Secretary Mueller's affidavit stated that the strike had paralyzed some 85 per cent of this vast and vital productive capacity (R. 163). It had resulted in the shutdown of 310 steel plants, 118 iron ore mines, and 11 transport facilities located in 32 states and extending across the nation (R. 172). As noted by Secretary Mitchell, by October 14, 1959, an estimated 780,000 workers were unemployed, including the 500,000 steel workers on strike, as a direct result of the strike (R. 172). Moreover, Secretary Mueller observed that each succeeding day of the strike accelerated and made more widespread the paralyzing effect on the nation's economy (R. 164–166). In the words of the union president himself, "[t]his strike has continued for longer than any other strike in this industry. In terms of loss of pay and of work, this is the largest strike which has ever occurred in the U.S.A." (R. 56).

The effect of the strike on available steel supplies, taking into account domestic plants still operating and imports of steel, was described in detailed fashion by Secretary Mueller. In terms of the gross quantities of steel available, he pointed out that inventories had been reduced from the abnormally high level of 24.8

million tons at the beginning of the strike to the dangerously low level of 10 million tons by October 15 (R. 164). Since inventories are currently declining at the rate of 5 million tons a month, he concluded that the inventories are thus "approaching the exhaustion point" (R. 164). Of the six plants still operating with capacities in excess of a million tons a year, moreover, he noted that one (with a capacity of 1.9 million tons) was owned by, and being operated for the sole purpose of supplying, the Ford Motor Company (R. 164). Imports of steel, he observed, had amounted to only the relatively small amount of 2.7 million tons for the entire first 8 months of the year and were wholly inadequate to serve the needs of the economy.

Because of time-lags in production and subsequent processing of steel, there would still be serious shortages, Secretary Mueller added, even if the mills were reopened immediately. Some four weeks would be required before the mills themselves could achieve full production,* and additional time would be required before the pipelines through the other stages of manufacture could be filled (R. 165). Another limiting factor would be the supply of iron ore, for, as the Secretary observed, even if the transportation of lake

*The maximum output that could be anticipated after the mills are reopened, including the full capacity of the currently operating mills, was estimated by Secretary Mueller to be (R. 165):

	Percent of capacity
First week	45
Second week	60
Third week	85
Fourth week	90

ores had been resumed on October 20, stockpiles would be down to some 10 million tons by May 1, 1960 (compared to 47.9 and 36.5 million tons on the same dates in 1958 and 1959), less than one month's supply (R. 165).

Secretary Mueller emphasized, moreover, that gross tonnage was an inadequate measure of the seriousness of the shortages, because of the great variety of shapes, forms, and analyses of steel required for the many different uses of steel. Even flat rolled steel products are produced in thousands of sizes, both in width and in thickness, and there are many different analyses in the three basic groups of carbon steel, alloy steel, and stainless steel—*e.g.*, there are 35 different types of stainless steel alone. Some producers make a wide range of sizes but not of shapes or analyses, while others make a range of analyses but not of forms, with the result that the shortages of particular kinds of steel are much more severe than the gross shortages would indicate (R. 162). This factor limits reliance even on the small quantity of imports now available, since imports are limited to a relatively few shapes and sizes (R. 164). It likewise makes the gross inventories misleading, since "many manufacturers are rapidly approaching the point at which they will be unable to utilize their remaining inventories of steel because of lack of balance of individual shapes and kinds, each of which is needed to maintain a production operation" (R. 165).

Secretary Mueller noted, finally, that steel is required not only to meet growth requirements of the

economy but to maintain the existing stock of structures and equipment intact—*e.g.*, replacement accounts for 60% of the steel used for railroad rolling stock and for rails and related articles; 40% of the steel used for residential construction; 50% of the steel used for industrial plant and equipment; and 30% of the steel used for household appliances (R. 163). And some of the more important uses of steel (*e.g.*, containers for food and drugs) depend entirely on current production (R. 163).

(2) *The effect of the strike on the nation's defense.*

The Government affidavits showed that the strike has already had serious consequences for the nation's many programs of national defense, including top-priority missile and satellite projects, and that the point had been reached where each day of further delay in shipments would cause irretrievable delays in proceeding with these programs. Acting Secretary of Defense Thomas S. Gates, Jr., speaking of the defense programs of all the armed services and basing his statement on information from officials in each service, stated that any further delays in normal steel shipments would result in "irreparable injury to the national defense and consequently to the national safety" (R. 168). Acting Secretary Gates noted that defense considerations did not end at our shores but involved commitments to overseas allies and organizations which were also suffering from the delays (R. 168, 163). Moreover, as was indicated for all areas of the economy, even if continuance of the strike terminated immediately, there would be a serious time-

lag before anything like normal production and delivery could be attained (R. 170).

As examples of defense projects detrimentally affected, Acting Secretary Gates pointed to the top priority programs involving ballistic missiles (ATLAS, TITAN, and POLARIS), where the steel products used were of a unique design and not available from existing inventories, from the production of plants still in operation, nor from steel imports (R. 168–171).[7]

[7] The ATLAS missile, for example, requires a specially processed stainless steel, and the delay in the delivery of that steel has reached a point at which "for every further day of delay a similar extension of the presently programmed delivery dates will be required" (R. 169). There is a similar shortage of the special steel required for pressure vessels used to transport fuel for the missiles (R. 169). Shortages of specialized structural shapes of steel has resulted in an anticipated delay of two or three months in the construction of four major launching sites for the ATLAS and TITAN missiles, and each day's further delay will cause additional delays. Production of the POLARIS weapon system has been halted at two plants for lack of various gauges of alloy sheet steel and plates and halts at four more plants are expected in a few days (R. 170). Construction of nuclear submarines to launch the POLARIS missile has also been delayed, as has production of various supporting elements of the system, such as a special transmitting facility and launching components (R. 170). The Acting Secretary noted finally that the adverse effect on the missile programs was paralleled, because of the strike, in construction of nuclear submarines, the naval shipbuilding program other than submarines (R. 170), and other areas of the national defense effort under the aegis of the Department of Defense.

Secretary of Commerce Mueller had also observed that some items of steel "required in the top priority missile programs are not made by any mill now operating, nor available from any inventory or from imports" and that continuation of the strike "will lead to extended delays in military construction and production, including the missile and satellite programs" (R. 162, 163).

A. R. Luedecke, General Manager of the Atomic Energy Commission, stated in his affidavit that the strike had already produced delays in nine military and civilian atomic energy projects and "should the strike continue unabated, it would induce a spreading slow-down in construction projects resulting in irretrievable delay" (R. 178). New facilities for use in the reactor research and development program have already been delayed and a delay in the completion of the new production reactor at Hanford is probable (R. 178–179). Continuance of the strike into 1960 would appreciably affect the atomic weapons program (R. 179).

Hugh L. Dryden, Deputy Administrator of the National Aeronautics and Space Administration, observed in his affidavit that programs contributing "importantly to the security interests of the United States" had been seriously delayed by the steel strike—for example, (1) the top-priority project Mercury, the nation's manned-satellite program;[8] (2) development of a single-chamber rocket engine capable of generating a million and a half pounds of thrust;[9] (3) Project Vega, development of a large space vehi-

[8] Construction of the Central Flight Control and Range Operations Building, essential to the operation of Project Mercury, has already been delayed by seven weeks by the strike and further delay will make it impossible to meet the original completion date (R. 175).

[9] Construction of two vital test facilities for this program requires a special steel plate which is needed immediately but is unobtainable. Some delay would be experienced even if the strike were ended immediately (R. 175).

cle,[10] and (4) applied research programs in aerodynamics and propulsion [11] (R. 174–175).

Finally, Secretary Mueller noted that on October 16, 1959, the Business and Defense Services Administration of the Department of Commerce issued an order that, upon resumption of steel production, immediate top-priority must be given by steel producers to defense programs. The order applied immediately to the small number of producers not closed down by the strike. However, since many of the required defense items are not now in inventory nor produced by operating plants, "the order will only be a partial solution to defense needs" (R. 166–167).

(3) The effect of the strike on the nation's economy

The affidavits of Government officials pointed up the equally serious consequences to the nation's economic health and safety which have already resulted and which would multiply at an ever-accelerating rate because of the steel strike. Secretary Mueller noted that the range of industries affected was constantly spreading beyond steel and industries related to steel.

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[10] Steel billets needed in the development of the Vega space vehicle are now unobtainable and, because of the lead time needed for processing the steel, any delay in delivery of the billets beyond November 15 will result in a corresponding delay in the Vega schedule.

[11] Completion of the Hypersonic Continuous Flow Facility at the Langley Research Center, needed for testing the effects on ballistic missiles and space vehicles of leaving and re-entering the earth's atmosphere, is now being delayed because the contractor fabricating the test sections is on strike. The original delivery date of January 1960 for the test sections could not now be met even if the strike were ended immediately (R. 175–176).

or dependent upon its finished products, to manufacturing and service industries generally (R. 166). Citing specific examples, he referred to the observable impact on public projects, including work stoppage on highway and bridge projects in 14 states involving 80 million dollars, work stoppage or delay on reclamation and power projects in 11 states involving more than 28 million dollars, and curtailment of construction for the nation's school and dormitory programs (R. 166). He also stressed the significance of the unavailability of certain shapes and forms of steel products in terms of current national needs for both defense and nondefense purposes (R. 162, 165).

Secretary of Labor Mitchell dealt with the growing unemployment problem resulting as an inevitable concommitant of the prolonged and widespread strike. Aside from the 780,000 idled as of October 14, 1959, as a direct result of the strike, scheduled layoffs, as reported by employment offices throughout the country, indicated that by the end of October approximately 365,000 workers who are not on strike will be laid off as a result of it. If the strike should continue until the end of November 1959, the total number made idle as a result of the strike would reach 1,775,000 and by the end of December 1959, 3,000,000. Including the families of men laid off, 9,000,000 persons would be directly and adversely affected by the strike by the end of this year (R. 172–173). As an inevitable corrolative, public relief rolls were growing, and claims for unemployment insurance were increasing rapidly (R. 173). As the Secretary noted, many of the fami-

lies of workers idled by the strike have used up their savings and are now in distress. In Pennsylvania alone, he reported, 17,000 families have been given public assistance because of the strike, and there were 243,000 additional participants in the surplus food distribution (R.173).

Wendell B. Barnes, Administrator of the Small Business Administration, stated the effects of the strike on the nation's 4,300,000 small businesses (R. 180). Many of these businesses, particularly vulnerable to fluctuations in the business cycle, were dependent on but could not obtain essential steel and steel products (R. 180–181). Their ability to compete was thus becoming undermined since they had been unable to store steel supplies as readily as large concerns (R. 181–182). Moreover, many small businesses, though far removed from dependence on steel products themselves, were dependent on the workers of steel and steel product industries as customers and were undergoing a threat to their existence (R. 181). Based on a very recent survey of trade associations and small businesses by officials of the Small Business Administration, it was concluded that if the strike continued through the middle of November 1959 a substantial number of small construction and manufacturing firms would have their business activities sharply curtailed and employment cut down; if the strike extended into January 1960 "the vast majority" of these small manufacturing and construction firms would be forced to close (R. 182). It was concluded that many small businesses would be unable to re-

cover from the losses that would flow from the continuance of the steel strike, while others would feel the effects of the strike for years (R. 184).

The adverse effects on the nation's railroad transportation system and shipbuilding industry as a result of the strike were set forth in the affidavits of Howard G. Freas, Member of the Interstate Commerce Commission, and Clarence G. Morse, Maritime Administrator and Chairman of the Federal Maritime Board. Commissioner Freas noted initially a crucial factor underlying consideration of the consequences of a further continuance of the strike—the freezing over of the Great Lakes around December 1, 1959 (R. 185–186). When that occurs and the iron ore freighters can no longer carry ore to the mills, Mr. Freas stated that rail transportation cannot afford an adequate substitute for carrying the ore (R. 186). He also noted that 60,000 railroad employees had been laid off because of a decline in traffic stemming from the strike (R. 187). Similarly, Chairman Morse concluded as to the shipbuilding industry that, because of disappearing inventories and shortages of specialized items, a continuance of the strike for another 30 to 60 days would mean costly delays to shipbuilding firms, working on both Navy and private contracts, and lay-offs of a high percentage of shipbuilding workers (R. 189–192).

B. THE UNION AFFIDAVITS

The union submitted four affidavits in opposition to the Government affidavits on the question whether the strike will imperil the national health and safety.

Leon H. Keyserling, consulting economist, and Chairman of the Council of Economic Advisers from 1950 to 1953, "compared the economic effect of the general recession which occurred in 1958 with the economic effect of the 1959 steel strike" (R. 95). Basing the comparison on his studies of unemployment, production, and purchasing power figures for the two periods, Mr. Keyserling concluded that "even if the steel stoppage were to continue for some additional time, its impact upon the economy would still be far less than that of the recession" (R. 95). Not venturing "to estimate with any degree of accuracy as to the effect of the steel strike upon the national economy" (R.96), Mr. Keyserling limited his general conclusion on the state of the economy to the comparison of the third quarter of this year with 1958 and did not discuss specific segments of the economy or considerations of national defense.

Meyer Bernstein, economist and International Affairs Representative of the union, stated: (1) that steel capacity still in operation constituted 15.36% of total capacity (R. 102); (2) that steel products have been imported from abroad in ever-increasing quantities (R. 104); (3) that there were informal arrangements between the steel union and Government officials to permit the movement of already manufactured defense items from struck plants (R. 106–107); and (4) that as of September 30, 1959, the impact of the strike, in terms of unemployment, was largely confined to the steel-producing and steel-consuming areas (R. 107–108).

Otis Brubaker, Research Director of the United Steelworkers, submitted an affidavit attesting to the fact that the steel companies still operating "with 15.36% of total industry ingot capacity, themselves have several hundred hot rolling mills and related producing facilities" (R. 123).

Robert R. Nathan, consulting economist, concluded that, combined with the steel incorporated in items already in existence, the available 15% of steel capacity in operation afforded an ample supply so that continuance of the strike would not "imperil the national health or safety, now or in the near future".[12] Mr. Nathan set up five bodies of statistical data to bear out his conclusion. Predicated on his view of certain data with regard to steel usage during the war in 1944, he states that only about 10% to 15% of capacity was used for purposes of health and safety, and, even assuming today's greater population and higher living standards, the amount now available from domestic plants in operation and from imports, excluding defense needs, is adequate (R. 71–81). Much the same type of projection is made, based on studies of (1) steel demand for the years 1940 and 1946, (2) the pattern of steel consumption in 1947, and (3) steel shipments in 1958 (R. 81–91).

Mr. Nathan's assumption, throughout his analysis, as to the meaning of national health and safety is

[12] R. 69. At other points, Mr. Nathan expresses the belief that we can accept safely "a delay of a few months" (R. 70), a "temporary delay" (R. 70), "a period of months" (R. 81), and, finally, a delay for the "short-run" (R. 87).

made clear when he reaches his study of the 1958 steel shipment figures, where he states:

> * * * The principal steel-using items that may be regarded as closely related to health or safety are those connected with food and drug production, processing and distribution, and those needed to maintain transport, utilities and essential services and appliances in sound working order. [R. 89.]

As for defense needs, not taken into consideration in his prior analysis, Mr. Nathan concludes that the quantity of steel needed is less than 5% of the productive capacity of the mills still in operation (R. 91). While he admits that certain specialized defense steel needs may not now be available, he believes that this problem could be met by the President's reopening only a very small number of mills (R. 92).

C. DR. SAULNIER'S AFFIDAVIT

Dr. Raymond J. Saulnier, present Chairman of the Council of Economic Advisers, took issue with Mr. Nathan's position. In an affidavit in support of the President's view that a continuance of the strike will imperil the national health and safety, Dr. Saulnier initially objected to Mr. Nathan's version of national health and safety as "too narrow to be useful" in assessing the impact of the steel strike (R. 195). It was too narrow, according to Dr. Saulnier, in several significant respects: (1) it took no account of the obvious fact that the very basis of the nation's health and safety depended in large part on a vigorous and efficient economy (R. 195); (2) it ignored this nation's

position and responsibilities as leader of the free world and the need to be economically secure to maintain that position (R. 195); and (3) it ignored the equally obvious fact that "[p]ublic morale would deteriorate in an economy deliberately reorganized to operate in low gear"—that unemployment, loss of purchasing power and the inevitable fears and tensions accompanying them would produce severely damaging consequences for our society (R. 195–196).

Dr. Saulnier's second major objection to Mr. Nathan's affidavit was that, even if one agreed with his narrow and restricted view of the relationship of the steel strike to the national health and safety, it nonetheless could not be concluded that the supplies of steel presently reaching the market were adequate (R. 196–197). Mr. Nathan's principal error in this respect was that he compared needs with available supplies in terms of ingot tons, ignoring the fact that steel is made into a vast variety of items, requiring specialized facilities of many different units and plants and the use of closely interrelated processes that often cannot be separated technically or economically so as to produce only specific items needed for defense while not producing other steel products. And to open a few plants to serve these needs would be "totally impracticable," and wasteful (R. 196–197). Moreover, limited sources of steel meant extremely tight Government controls to meet the problems of allocation priorities (R. 198).

Finally, Dr. Saulnier pointed out that Mr. Nathan was extremely vague "as to the maximum duration

of a steel strike that he would regard as tolerable from the standpoint of the nation's health and safety"—even given Mr. Nathan's limited view of that health and safety (R. 198). In Dr. Saulnier's view, the continuance of the strike was intolerable in view of the acceleration of the extensive economic dislocation it was causing. He concluded that "any realistic interpretation of the health and safety of the nation" counseled against taking the risk of permitting "a recession of major proportions—in this case, artificially produced" (R. 199–200).[13]

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[13] Conceding that the "wider and graver effects of the strike are yet to make themselves felt," Dr. Saulnier pointed out that "they may be expected very soon" because of the rapidly-approaching exhaustion of our steel inventories (R. 199–200):

> With the exhaustion of steel inventories, all manufacturing industries that use steel would have to stop operations except to the extent that they can use current output, imports, and substitute materials. This contraction of production is already under way. Reports of layoffs by manufacturers of automobiles, railroad equipment, agricultural and road building equipment, and industrial machinery are noted in newspapers with increasing frequency. Evidence of delays and postponements of construction projects, public and private, is mounting rapidly. Layoffs of several million could result from the spreading impact of steel shortages in steel-using industries and from the secondary effects felt elsewhere in the economy.
>
> * * * An employment decline of this magnitude would be equivalent to a recession of major proportions—in this case, artificially produced. It would involve huge losses of personal income and a needless erosion of individual and social savings. The consequent sharp reduction in funds available for the purchase of food, clothing, and medical care would impose serious hardships on millions of American families and literally endanger their health and safety.

3. THE FINDINGS OF THE DISTRICT COURT

After noting the background of the steel strike and the President's actions, taken in accordance with the Taft-Hartley Act, the district court, in findings 13 through 16, made the factual determinations leading to its conclusion that continuance of the strike imperiled the national health and safety, and, consequently, justified issuance of the statutory injunction (R. 245–247).

The court found initially that the strike had closed down 85% of steel production capacity and that inventories had dropped below the level required to sustain continued production of industries and businesses dependent upon steel products (R. 246). Moreover, 765,000 persons, including the 500,000 striking steel employees, were now idled by reason of the strike, and these workers supported families numbering over 2,000,000 persons (R. 246). If the strike continued through the end of November, 1,775,000 would be made idle as a result of the strike, and 3,000,000 by the end of December of this year (R. 246). Including the families of the unemployed workers, that would mean that, if the strike continued to the end of this year, over 9,000,000 people, would probably be affected (R. 246).

The court then found that the order of the Business and Defense Services Administration of the Department of Commerce, requiring top-priority to be given by steel producers to defense program use, could not meet the essential requirements of the Department of Defense since many of the special steel products

needed were not available in inventory or produced by the plants still in operation (R. 246).

In finding 15, the district court specified the ways in which the strike, if permitted to continue, would imperil the national health and safety. First, the court found that top-priority missile programs required items of steel not made by plants still operating. Any delay in resumption of production would mean an irretrievable loss of time in the supply of weapons systems essential to the defense plans of this nation and its allies (R. 246–247). Second, the continuance of the strike had delayed and would further delay essential space programs, including the top-priority Project Mercury, vital to the nation's security (R. 246). Third, the same sort of delay was adversely affecting the building of nuclear submarines and the naval shipbuilding program, and was thereby injuring national defense and imperiling the national safety (R. 246–247). A final finding on defense needs was that exported steel products were vital to the support of this nation's overseas bases, for NATO, and similar collective security groups, and continuance of the strike would impair these programs, thus imperiling the national safety (R. 247).

As to the non-defense considerations involved, the district court found that continuance of the strike would adversely affect millions of small business enterprises and make idle millions of workers and a large proportion of the facilities in industries dependent upon steel for continued operation (R. 247). It found that manufacturing industries directly depend-

ent on steel mill products account for the employment of about 6,000,000 workers and normal annual wages and salaries totalling approximately $34,000,000,000. The products of these industries were valued at over $125,000,000,000 (R. 247).

Concluding that it had jurisdiction over the parties and that continuance of the strike "will imperil the national health and safety and thereby cause irreparable damage and injury to the United States of America for which there is no adequate remedy at law" (R. 247), the district court issued its injunction.

4. THE DECISION OF THE COURT OF APPEALS

The court of appeals affirmed the judgment of the district court. Chief Judge Biggs, writing for the majority, analyzed and rejected the union's contention that there was no "case or controversy" before the federal court which it could adjudicate in the sense required by the Constitution. Turning to the critical findings of the district court dealing with the impact of the steel strike, the majority concluded, after a detailed review of the entire record, that the findings of the lower court were not clearly erroneous. Significantly, the majority noted that:

> We have examined carefully the contents of the affidavits submitted by the Union. Variances as they exist between these affidavits and those of the United States are created largely by different avenues of approach. We find no variances in the affidavits basically material to the findings made by the court be-

low or to the issues with which we are immediately concerned.

On a review of the entire record we conclude that we cannot say that the findings made by the court are clearly erroneous.

Finally, the majority held that the district court had not abused its discretion in issuing the injunction. With respect to the union's argument that other alternatives existed which could have been utilized by the Government to relieve the danger to the national health or safety created by the steel strike, the majority stated:

> We cannot accept the Union's argument in this respect. If our conclusion is correct that there is sufficient evidence in the record of the present or future danger to national health or safety, we conclude that the danger is great enough and calls for a remedy as sweeping as the law will permit. Whether the remedy provided by the Labor-Management Relations Act is sufficient to accomplish a cessation of labor strife is a question not for this court but for Congress. We conclude, therefore, that the court below did not abuse its discretion in granting the relief which the United States prayed for.

The court buttressed this conclusion by further noting that the national emergency provisions of the Act represented a settled congressional policy as to the machinery available for abating a labor strike creating a menace to the national health or safety.

The dissenting judge (Hastie, J.) did not take issue with the majority's conclusions that (1) the

national emergency provisions of the Act are constitutional and (2) the district court findings as to the imperilment of the national health and safety are adequately supported by the evidence. Rather, the dissenting judge was of the view that "sound discretion" required a denial of the requested injunction because there was no showing that the injunction would promote a negotiated settlement of the labor dispute between the union and the steel companies.

ARGUMENT

The comprehensive ruling and opinion of the Court of Appeals for the Third Circuit has disposed of the issues in this case, and there is no need for further review by this Court. On the constitutional question raised by the union, the Third Circuit below is in accord with an earlier decision of the Second Circuit in 1953, and the petitioner's contentions are clearly without merit. The factual issue of whether the continuation of the current steel strike will imperil the national health and safety has been resolved against petitioner by the concurrent findings of the district court and the court of appeals; no judge has indicated disagreement with these conclusions, and there are no extraordinary circumstances warranting further scrutiny by this Court. The novel view of the emergency provisions of the Labor Management Relations Act of 1947 taken by Judge Hastie, in his dissent below, is plainly incorrect and at war with the purpose and terms of the Act. Accordingly, we believe that the existing delay in the ending of the steel strike, pursuant to the emergency provisions of the Act, can

and should appropriately be terminated by a denial of certiorari.

I. SECTION 208 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 IS CONSTITUTIONAL

Petitioner's argument against the constitutionality of the emergency labor dispute provisions of the Labor Management Relations Act, 1947 (61 Stat. 155, 29 U.S.C. 176–180), is entirely without substance and has been effectively answered by the Third Circuit. The union does not question the validity of the provisions as an exercise of the Congressional power to protect interstate commerce against serious interruptions. It urges, however, that the Government's suit seeking an injunction against the present strike does not present a justiciable "case" or "controversy" within the meaning of Article III of the Constitution, and that the statute purporting to confer jurisdiction over this action is therefore unconstitutional. This contention—rejected by the court below and also by the Second Circuit in *United States* v. *United Steelworkers of America,* 202 F. 2d 132 (C.A. 2), certiorari denied before judgment, 344 U.S. 915—ignores the history, purposes, and nature of the jurisdiction vested by Congress in the district courts by the Act.

1. In *In re Debs,* 158 U.S. 564, 584, this Court upheld an injunction obtained by the Government against the Pullman Strike of 1894, on the broad ground that "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper

assistance in the exercise of the one and the discharge of the other * * *." In 1932, the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. 101–115) withdrew a large measure of this jurisdiction from the federal courts.[14] In view of the experience during World War II with emergency-creating labor disputes, Congress decided that the Government must be given power to protect the public when the effect of a labor dispute is to imperil the national health or safety. See *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 598–599 (concurring opinion). Accordingly, in the Labor Management Relations Act of 1947, Congress removed part of the barrier to the exercise of a jurisdiction which, before 1932, had been exercised by the courts without express statutory authority. To prevent the recurrence of abuses which the Norris-LaGuardia Act was designed to eliminate, jurisdiction was limited to strikes affecting all, or a substantial part, of a national industry, and imperiling the national health or safety; the maximum duration of injunctions was fixed at 80 days; and the circumstances and conditions governing issuance of injunctions were carefully defined.[15]

All the requisites of a justiciable controversy are present, we believe, in a proceeding under the national emergency provisions of the Act. The case or controversy requirement of Article III is a requirement only that there be before the court "a liti-

[14] We do not here touch upon the right of the United States as employer to invoke the aid of the courts in strikes by its employees. Cf. *United States* v. *Mine Workers*, 330 U.S. 258.

[15] See S. Rep. No. 105, 80th Cong., 1st Sess., p. 15.

gant * * * who has a claim presented in a form and under conditions 'appropriate for judicial determination.'" Frankfurter, J., in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 150. It is concerned only with the nature of the proceedings in which courts act, and not with the source of the substantive rights with which they deal.

It is difficult, of course, to define precisely all the elements of a justiciable controversy; in large measure the question is a matter of "the expert feel of lawyers" (Frankfurter, J., in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 150). Whether or not a given proceeding constitutes a justiciable controversy depends only on whether, in the posture in which it comes before the court, its form is of a kind with which courts have been traditionally regarded as dealing. See *Tutun* v. *United States*, 270 U.S. 568, 576, 577. The terms "case" and "controversy" have been given content only by the decisions of myriad cases in varying circumstances, dealing with questions of justiciable as compared with political subject matter:[16] with standing to sue;[17] with the ad-

[16] Compare, *e.g.*, *Colegrove* v. *Green*, 328 U.S. 549; and *Coleman* v. *Miller*, 307 U.S. 433, with *Nixon* v. *Herndon*, 273 U.S. 536; and *Ex parte Siebold*, 100 U.S. 371.

[17] Compare, *e.g.*, *Tileston* v. *Ullman*, 318 U.S. 44; *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118; *Premier-Pabst Sales Corp.* v. *Grosscup*, 298 U.S. 226; *Frothingham* v. *Mellon*, 262 U.S. 447, with *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; *Coleman* v. *Miller*, 307 U.S. 433; *Pierce* v. *Society of Sisters*, 268 U.S. 510; and *Truax* v. *Raich*, 239 U.S. 33.

versary nature of proceedings;[17] with ripeness for decision;[18] and with the finality and enforceability of the relief granted.[19] But under any definition it is hard to conceive of a function more typically judicial than that assigned to the district court by the present statute.

The court is empowered under § 208(a) to grant or deny an injunction if it finds—by the judicial process—certain facts to exist, *i.e.*, that the "threatened or actual strike or lock-out—

> (i) affects an entire industry or a substantial part thereof engaged in * * * commerce, * * * among the several States * * * or engaged in the production of goods for commerce; and
>
> (ii) if permitted to occur or to continue, will imperil the national health or safety * * *

The proceeding is adversary in nature and fully ripe for decision, with the United States as plaintiff asserting that the necessary facts exist and that the law requires the granting of the statutory remedy, and the union and the company as defendants asserting, or free to assert, the contrary. The proceeding

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[17] Cf., *e.g.*, *United States* v. *Johnson*, 319 U.S. 302; *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 281; *Muskrat* v. *United States*, 219 U.S. 346; *Chicago & G. T. Ry.* v. *Wellman*, 143 U.S. 339; *Lord* v. *Veazie*, 8 How. 250.

[18] Compare *Willing* v. *Chicago Auditorium Association*, 277 U.S. 274, with *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227.

[19] Compare *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40; *Gordon* v. *United States*, 117 U.S. 697; and *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, with *United States* v. *Jones*, 119 U.S. 477.

is conducted throughout in judicial form subject to the ordinary rules of pleading and evidence. The court must decide the controverted issues. The judgment is final and is entered on the docket of the district court as of record, and is enforceable against the defendants by ordinary process. The relief granted is an injunction—traditionally within the function and powers of courts of equity. And the statute provides review by a court of appeals and this Court (§ 208(c)).

2. Notwithstanding the existence of all the traditional elements of a justiciable controversy, petitioner contends § 208 is unconstitutional because it creates no "duties" and confers no "rights" other than the right to seek an injunction. We may, for purposes of argument, accept petitioner's characterization of the legal relationships created by the Act, and assume that the union is under no "duty" to terminate the strike until ordered to do so by the court. For the basic fallacy of petitioner's argument is the premise that the judicial function is limited to adjudicating and declaring *pre-existing* rights and duties and may not extend to the "creation" of rights and duties. To the contrary, a large part of the business of the courts is the granting of relief to applicants whose only "right" is the right to the relief sought.

The unanimous decision of this Court in *Tutun v. United States*, 270 U.S. 568, holding that a petition for naturalization presents a case or controversy within the judicial power of the federal courts, is, we think, dispositive of petitioner's contentions here.

Obviously an alien seeking naturalization does not, prior to the decree of naturalization, have the "rights" of a citizen. His petition for naturalization seeks not a declaration of his existing rights but a decree giving to him a new status, and his only "right" is his right to petition the court for such a decree. Yet the Court, in an opinion by Mr. Justice Brandeis, held that the asserted statutory right to the decree itself presented the necessary case or controversy (pp. 576–578; citations omitted):

> * * * Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. It may give to the individual the option of either an administrative or a legal remedy. Or it may provide only a legal remedy. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character.
>
> The petitioner's claim is one arising under the Constitution and laws of the United States. The claim is presented to the court in such a form that the judicial power is capable of act

ing upon it. The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure. The United States is always a possible adverse party. * * * Its contentions are submitted to the court for adjudication. * * *

* * * It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate. There is, of course, no "right to naturalization unless all statutory requirements are complied with." The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfilment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court. In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor.

The statutory right of the United States, upon establishing the "requisite facts," to a decree enjoining a strike imperiling the national health and safety is no different in any aspect material to the judicial power from the statutory right of an alien to a decree giving him the rights of citizenship. In neither case

is it necessary that the statutory right be self-executing or be implemented initially by administrative action. Rather, Congress "may provide only a legal remedy" and the right created may be limited to the right to obtain the judicial action provided for. The assertion of that right itself creates the case or controversy, and it is immaterial whether the right previously or otherwise "exists."

Even more closely analogous in nature to the proceedings here are condemnation proceedings. Prior to the order in a condemnation action vesting it with title, the United States obviously has no "right" to the property being condemned and the owner has no "duty" to convey it. The power of eminent domain gives the United States only the right to have the court, in a proper proceeding, direct conveyance of the property to it and thereby create its rights to the property. Yet the federal courts were early held to have jurisdiction over a federal condemnation proceeding as a "suit" at common law, *Kohl* v. *United States*, 91 U.S. 367, and it has never been questioned that such a proceeding presents a case or a controversy. The express statutory right of the United States to have the courts enjoin prescribed conduct deemed inimical to its interests is no less justiciable than its right to have the courts convey to it property deemed necessary to its operations. In neither case does it have a pre-existing right to the thing sought.

Other kinds of admittedly judicial proceedings which have for their purpose the creation of legal relationships, rather than the adjudication and vindi-

cation of *pre-existing* rights and duties (other than the right to the judicial remedy itself), are numerous: for example, divorce (which need not depend upon the grounds for divorce being otherwise a "wrong"); adoption; discharge in bankruptcy; commitment proceedings; appointment of guardians; change of name; and probation of wills. While some of those proceedings are not commonly within the original jurisdiction of the federal courts, that is not because they do not present a case or controversy, for when a federal question is presented they are clearly within the appellate jurisdiction of the Supreme Court.

Another analogy is the judicial enforcement of administrative orders—*e.g.*, subpoenas or cease and desist orders—which have no legal consequences until so enforced. While petitioner contends that such an administrative order in theory gives rise to a "duty" even before enforced, though without a remedy, that distinction reduces the constitutional requirement of a case or controversy to a mere form of words. In that view, § 208 would have been valid if it provided that the President should first "order" the strikers back to work and then seek judicial enforcement of the order, but is invalid because a judicial order is sought in the first instance. That distinction, moreover, cannot explain *Ullmann* v. *United States*, 350 U.S. 422, where clearly the witness had no duty to testify before the grand jury until ordered to do so by the court, for only then did he obtain immunity and lose his privilege under the Fifth Amendment to

refuse to testify.[21] Similarly, under § 10(l) of the National Labor Relations Act, a district court may, on application of the Board, enjoin conduct which it has "reasonable cause to believe" may be an unfair labor practice pending the outcome of the Board proceedings. *Douds* v. *Local 1250, Retail Wholesale Dept. Store Union*, 170 F. 2d 695 (C.A. 2). In such a case, clearly the respondent had no "duty" to cease the conduct prior to the injunction.

A final analogy is the power of the United States, even without express statutory authorization, to invoke the aid of the courts to abate obstructions to interstate commerce. *E.g., In re Debs*, 158 U.S. 564; *Sanitary District* v. *United States*, 266 U.S. 405; cf. *Pennsylvania* v. *The Wheeling &c. Bridge Co.*, 13 How. 518; *Georgetown* v. *Alexandria Bridge Co.* 12 Pet. 91. While it may be possible in those cases to say that the obstruction was always "unlawful", in fact little seems to turn on that and frequently the conduct is unlawful only in the sense that it is subject, in judicial proceedings, to being abated.

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[21] The Court's reliance in *Ullmann* (350 U.S. at 434) on *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, shows, moreover, that the teaching of that case does not, as petitioner contends, depend on being able to characterize the administrative subpoena as itself creating an abstract "duty" which is then "enforced" by the judicial order.

3. Moreover, if it were necessary to describe the conduct as "unlawful" in order to make a suit to enjoin it a case or controversy—which we think is clearly not the case—such a characterization of emergency strikes could be made here. The essence of the national emergency provisions of the Act is a legislative judgment that continuation of a strike or lockout which in fact imperils the national health and safety is "wrongful" for it impinges on public interests superior to the private rights of the parties to the dispute.[22] The provision of a remedy by Congress implies, we think, the prohibition of the conduct for which the remedy is created, just as the "imposition of punishment implies a prohibition of the act punished." *Ex parte Siebold*, 100 U.S. 371, 388. The legal "right" protected by the injunctive order is the right, created by the Act, of the United States and the public to be free from a work stoppage threatening the national health and safety. For other examples in which jurisdictional statutes, though phrased in procedural terms, have been construed to create rights

[22] See § 1(b) of the Act, declaring that "above all * * * *neither party has any right* in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest" and that "It is the purpose and policy of this Act * * * to define and *proscribe* practices on the part of labor and management which affect commerce and are inimical to the general welfare, and *to protect the rights of the public* in connection with labor disputes affecting commerce" (emphasis added). The quoted language is language of rights and duties; and when read together with the provisions of § 208 makes clear the substantive content implicit in its remedial phraseology.

and correlative duties, see *Pope* v. *United States*, 323 U.S. 1; *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447; *Chapman* v. *Marcus Elwood College*, 225 F.2d 230, 231 (C.A. 9).

4. Petitioners' final contention that § 208 assigns to district courts a function which is legislative or administrative rather than judicial is likewise plainly without merit. The granting of injunctions is unquestionably a judicial function, and there is no question here of subsequent administrative or legislative modification of the court's judgment, as in *Hayburn's Case*, 2 Dall. 409, *United States* v. *Ferreira*, 13 How. 40, *Gordon* v. *United States*, 117 U.S. 697, or *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103.

We may agree with petitioner that the 80-day injunction is only one of several steps provided by Congress for dealing with strikes and lockouts and that the other steps are not judicial in nature. It by no means follows, however, that the injunction proceedings themselves are not "judicial." There is no necessity that injunctive relief be ancillary to some other judicial proceeding, and the proceeding under § 208 is a complete and independent "case" in itself—affording the United States the substantive relief of being free from the strike for a period of 80 days. The restriction of the injunction to 80 days limits only the extent of the substantive right conferred, and does not mean that the enforcement of that right is non-judicial in character. No injunction is permanent in any

absolute sense (see *United States* v. *Swift & Co.*, 286 U.S. 106) and Congress, having the undoubted power to authorize unlimited injunctions, surely has the lesser power to grant temporary relief.

Moreover, even if the injunction were viewed as being "ancillary" to the other steps to be taken to settle the labor dispute, it would not for that reason be any less a judicial function. To the contrary, Congress can properly vest the federal courts with jurisdiction to issue such equitable relief as may be appropriate in the public interest to encourage peaceable settlement of labor disputes affecting the national welfare. *Virginian Ry.* v. *System Federation*, 300 U.S. 515, 549–553.[23] Contentions similar to those advanced here have been rejected by this Court in connection with the utilization of courts in aid of contracts to arbitrate. *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263; cf. *Red Cross Line* v. *Atlantic Fruit Company*, 264 U.S. 109; *Continental Grain Co.* v. *Dant & Russell*, 118 F. 2d 967 (C.A. 9); *Goldhill Trading & Ship. Co.* v. *Caribbean Ship. Co.*, 56 F. Supp. 31 (S.D.N.Y.).

The Act, it may be noted, also provides that, after the expiration of the injunctive period, the President shall refer the dispute, if not by then resolved, to Congress. Here again, it cannot validly be argued that subsequent action by Congress, after such refer-

[23] The many cases in which courts enforcing the National Labor Relations Act have ordered collective bargaining are also in point.

ence, has any effect upon the finality of the court's judgment, so as to convert the court's function into forbidden legislative or administrative action. By the statute's very terms the injunction issued by the district court must have expired before the matter comes before Congress. And the statute does not contemplate Congressional review of the district court's proceeding. Rather, after the expiration of the 80-day maximum "cooling-off" period, in which efforts at settlement by way of conciliation and mediation must be made, Congress reserved the right to examine the facts of the dispute to determine what, if any, further action in the public interest was required.

II. THE CONCURRENT FINDINGS OF THE COURTS BELOW THAT CONTINUANCE OF THE STEEL STRIKE "WILL IMPERIL THE NATIONAL HEALTH AND SAFETY" ARE FULLY SUPPORTED

The case was, by stipulation, submitted to the district court on the affidavits filed by the parties, and the facts attested to in the affidavits submitted by the Government were not controverted by the union's affidavits in any material respect. Those uncontroverted facts are summarized in the Statement (*supra*, pp. 6-17, 20–22), and establish beyond doubt, we believe, that continuance of the strike will, as the district court found and the court of appeals agreed, imperil the "national health and safety." The serious consequences of the strike already felt by the nation's many defense programs has been attested to by the Acting Secretary of Defense (*supra*, pp. 11–12), the General

Manager of the Atomic Energy Commission (*supra*, p. 13), the Deputy Administrator of the National Aeronautics and Space Administration (*supra*, p. 13), and the Maritime Administrator and Chairman of the Federal Maritime Board (*supra*, p. 17). The staggering impact of the strike on the nation's economic health has been shown in the affidavits of the Secretary of Commerce (*supra*, pp. 7–11, 14), the Secretary of Labor (*supra*, pp. 15–16), the Small Business Administration Administrator (*supra*, pp. 16–17), a Member of the Interstate Commerce Commission (*supra*, p. 17), and, finally, by the Chairman of the Council of Economic Advisers (*supra*, pp. 20–22). In both of these areas, the showing has been not only that the steel strike has already had damaging impact but that, if permitted to continue, the consequences would be disastrous. In many cases, the loss would be irretrievable; and each day that the strike is permitted to continue accelerates the pace at which the impact of the existing stoppage of steel production is felt in every phase of the nation's life. The President and both courts below have found that continuation of the strike will imperil the national health and safety, and their concurrent conclusions are entitled to the greatest weight.

Petitioner appears to dispute neither the impact of the strike upon the defense projects nor the economic hardship and dislocations it has brought about and threatens. Petitioner's contentions are rather (1) that the defense needs could be met by some lesser

measures than injunction of the strike and (2) that economic disruptions, even though nation-wide and however severe, are not the kind of "peril" that § 208 permits the President to forestall. In our view, neither contention, both rejected by the two courts below, presents a substantial question calling for review by this Court.

A. THE NATIONAL SAFETY IS IMPERILED BY THE DIRECT EFFECT OF THE STRIKE IN OBSTRUCTING AND DELAYING ESSENTIAL DEFENSE PROJECTS.

Regardless of the other effects of the strike, the effect found by the courts below and the President on defense projects by itself requires that the injunction be sustained. Petitioner does not deny that essential defense programs have been delayed by the strike, that certain kinds and shapes of steel necessary for those programs are not available from the mills still producing or from inventories or imports, and that that effect of the strike is of a nature that § 208 may be utilized to avoid. It contends, however, that the injunction is too drastic a remedy for the need, and that the need could rather be met by reopening a few mills to produce the specific items found to be needed in the defense effort.

Even if the answer were otherwise adequate, however, the solution suggested is not a feasible one. In the first place, as Dr. Saulnier points out (R. 196–197), it is neither technically nor economically possible to reopen a steel mill solely to supply a

specific and limited need of the military.[24] Because of the complexity of the productive processes and the large scale of operation required for even minimum efficiency, it is obviously impractical to reopen a plant for less than full-scale production. And even if technically possible, such selective and limited operation would be "exceedingly uneconomic and wasteful" and would constitute a "grotesque" utilization of our steel-producing facilities. The suggestion, moreover, assumes a sophistication of materiel planning and control that has never been fully achieved even in periods of total mobilization. Even if the needs specifically foreseen could be met by special arrangements and priorities, there would remain the inevitable unforeseen bottlenecks arising from the general shortage of steel. There is simply no machinery now in existence capable of regulating with precision the flow of steel to all the thousands of enterprises directly or indirectly supporting defense projects.

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[24] In support of that point, Dr. Saulnier quoted the Business and Defense Services Administration of the Department of Commerce as declaring that "in order to satisfy defense requirements alone from the standpoint of size, grade, and product," would be necessary to reactivate 25 to 30 hot rolling mills together with supporting blast furnaces, and Bessemer, electric, open hearth and vacuum-melting furnaces. Additional facilities for pickling, coating, heat-treating, cold finishing, shearing, cutting, testing, and the like would also be required. To reopen these plants for the production of steel products to meet only defense requirements would be totally impracticable. The problems of scheduling the limited tonnages involved, plus the cost and technical difficulty of start-ups and shut-downs would appear to be insurmountable." (R. 196.)

Moreover, even if other procedures were available to the President to relieve specific defense needs, there is nothing in the Act requiring them to be exhausted first before proceeding under § 208. Rather, the conditions of § 208 being satisfied, the complete remedy there afforded is available, and the President is not required to resort to an exorbitant and wasteful use of steel-making facilities and a complex and thorough-going system of priorities—even if it could be established in time—in order to meet essential defense needs. In short, the defense effort being imperiled by the present shut-down of 85% of

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There is nothing in the terms or legislative history of the Defense Production Act of 1950, 64 Stat. 798, 50 U.S.C. App. 2061, to suggest that the President was intended or required to exhaust his priority, allocation, and requisition powers under that Act before invoking the national emergency provisions of the Labor Management Relations Act of 1947. On the contrary, the indications are that Congress intended the Defense Production Act not to modify, interfere with, or impinge upon the 1947 Act in any way. Title V of the Defense Production Act dealt with settlement of labor disputes (until April 30, 1953), but Section 503 of that Title, 50 U.S.C. App. 2123, provided that no action taken under the Title should be inconsistent with the Labor Management Relations Act or other labor legislation. See also S. Rep. No. 2250, 81st Cong., 2d Sess., pp. 41-42; 96 Cong. Rec. 11630, 11750, 12175, 12905-6, 14073.

Moreover, when Congress, in 1952, amended the Defense Production Act itself to declare the sense of Congress that the President should invoke the emergency provisions of the Taft-Hartley Act for the then-current steel strike (Act of June 30, 1952, 66 Stat. 305, 50 U.S.C. App. 2123), the legislative history reveals no suggestion that those provisions could not be invoked until use or exhaustion of the priority, allocation, or requisition powers granted by the Defense Production Act. See 98 Cong. Rec. 6598, 6600, 6601-4, 6613, 6615, 6616 (Senate debate); 8023-8050 (House debate).

the capacity of the industry, as petitioner in effect concedes, the conditions of the statute have been met and the injunction must be sustained.

B. THE NATIONAL HEALTH AND SAFETY IS IMPERILED THROUGH THE EFFECT OF THE STRIKE ON THE ECONOMY AT LARGE

If we are correct in our view that the national safety is imperiled by the shortage of steel needed directly for defense projects, it is unnecessary to go further to consider the impact of the strike on the economy as a whole. An independent basis for the injunction, however, is that the mounting economic dislocation, which with the exhaustion of inventories will spread at an accelerated rate, itself imperils the national health and safety. The President and the courts below have so found.

1. In view of the strategic importance of steel production to our economy, the severe and widespread ramifications of a prolonged steel strike cannot be denied. Nor does petitioner seek to deny them. It claims only that such economic hardships are not matters of "national health and safety" within the meaning of the Act. Rather, in its view, "health" can be imperiled only by a physical shortage of essential consumer goods and services: food, drugs, light, heat, communications facilities, etc. (see Nathan affidavit, R. 70–91). In effect, so long as the essential end-products remained available on the market, a steel strike otherwise paralyzing the economy, throwing millions of workers out of work, and bankrupting thousands of businesses, would not affect the "national health". By similar reasoning, petitioner

asserts that the "national safety" is not imperiled so long as current defense projects proceed uninterrupted, however much damage is done to future productive capacity of the country as a whole.

In our view, "national health and safety" cannot be given such a niggardly construction. "National health" includes more than the bodily health of the nation's citizens; when Congress deals solely with physical health, it usually limits its reference to "public" health. "National" health is much broader; it includes the "health" of the nation itself as a viable, productive, economy capable of social progress at home and meeting its obligations abroad. Widespread unemployment and business failures impair the health of the nation no less than malnutrition impairs the health of the citizen, and there is nothing in the legislative history of the Act to show that Congress intended the otherwise broad and flexible standard adopted to be limited in application to the latter.[26] In our view,

[26] Petitioner's sole reliance for a narrow construction of the phrase "national health and safety" is that the bill as it passed the House had contained the phrase "public health, safety, *or interest*" (§ 203(a), H.R. 3020, 80th Cong., 1st Sess.), from which petitioner infers that the Senate, in substituting the present provisions, must have intended sharply to limit their application. In fact, of course, the Senate substituted an entirely new bill for the House bill and the text of the emergency-strike provisions was completely different in the two bills, so that the difference in phraseology does not necessarily reflect anything more than the difference in draftsmen. That the two phrases were not thought to be fundamentally different in scope (though "public interest" may well have been thought to be particularly vague and unlimited) but were used virtually interchangeably is shown, moreover, by the fact that the sec-

therefore, the preservation of the economy from the widespread dislocations resulting from a prolonged nation-wide strike in a basic industry is itself a proper end for the utilization of the injunctive power provided in § 208.

2. Moreover, even if we accept petitioner's contention that "national health or safety" relates only to physical health of our citizens and the security of our country, so that the economic well-being of the nation is not itself an end to be served by such an injunction,

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tion of the House bill which refers to "public health, safety, or interest" bore a heading referring only to "public health and safety," whereas the statute as finally passed speaks in the declaration of policy (§ 1(b)) of practices "which jeopardize the public health, safety, *or interest*" (emphasis added). The various differences of wording which now seem so crucial to petitioner thus seem not to have been matters of concern to the legislators.

More important than the difference in the phraseology used in the House and Senate bills was the difference in the industries covered by the respective provisions. The House bill applied only to strikes which resulted in the substantial curtailment of "transportation, public utility or communication services essential to the public health, safety, or interest" (§ 203(a)), whereas the bill substituted in the Senate and finally passed applied equally to industries engaged in "trade" or "the production of goods for commerce." The expansion of the coverage of the provisions beyond the so-called "essential" industries seems hardly consistent with a purpose to narrow the test of "national health and safety" to an impact upon the availability of "essential" goods and services. That the concern was not so much with the qualitative nature of the public injury (*e.g.*, physical health, as opposed to economic hardship) as with the quantitative scope of the impact of the strike is also indicated by the statement in the Senate committee report that the provision affords relief when a strike "is conducted *on a scale* imperiling the national health or safety." S. Rep. No. 105, 80th Cong., 1st Sess., p. 15 (emphasis added).

it does not follow that "health" and "safety" as so defined are not affected *through* the economic impact of the strike. To the contrary, any serious disruption of our economy ultimately has an effect both upon the nation's ability to resist aggression and upon the health of our citizens.

The relationship of a viable economy to our national security can hardly be doubted. As Dr. Saulnier observed (R. 195):

> A sound and vigorous United States economy is essential not only to maintain the confidence of friendly and uncommitted nations; it is essential also to the deterrence of potential aggressors. For us to give an impression of national inability and, worse than that, of national unwillingness to avert a predictable and avoidable paralysis of a basic sector of our economy could invite military adventurers to set small wars in motion. To fight such wars requires economic flexibility as well as readiness. Inability on our part to mobilize soon enough, or to turn our full productive powers to the challenge with sufficient speed, could have most unfortunate consequences for the nation.

The effect of widespread unemployment upon the health and morale of the public is likewise hardly open to question. Petitioner concedes the essentiality of various consumer goods and services to the "national health"—*e.g.*, food, medical care, heat, shelter—but assumes that that need is met simply by the availability of those goods and services without regard to the ability of the public to pay for them. Obviously, however, the inability of workers to pro-

vide for their families' health needs because of unemployment "imperils" their health just as surely as does the nonavailability of the needed goods.

3. Finally, even accepting petitioner's premise that the "national health" is fully preserved simply by the availability of sufficient steel for the production of "essential" goods and services, its contention is still basically defective. Petitioner's "proof" that the unstruck mills supply sufficient steel for those purposes is limited to a statistical analysis purporting to show that the gross tonnage of steel necessary to maintain essential "health" services is less than the capacity of the unstruck mills (R. 69–91). Accepting that comparison as to the gross ingot tons produced and needed, however, it by no means follows that the specific *kinds* of steel necessary for essential services are available. To the contrary, it appears that specific items that are essential even under petitioner's classification are in fact not available from the operating mills.[27] Moreover, even if all the needed kinds of steel were being

[27] Dr. Saulnier, for example, pointed out that "Mr. Nathan's concentration on aggregates of ingot tons rather than on specific steel items obscures such other vital facts as the following, noted by experts intimately acquainted with the current situation: (i) mills now operating could not supply the axles needed for railroad car use; (ii) less than a minimum supply of rolled railroad wheels can be obtained from plants still in operation; (iii) there is no mill now operating that could supply sizeable quantities of wide and heavy steel plates for vital military and essential civilian uses; (iv) no steel sheet piling, essential in many construction projects, including docks, bridges and dams, is available from presently operating plants; and (v) none of these essential steel products are imported in significant amounts." (R. 197.)

produced, there is no way to assure their being channeled to the uses deemed "essential" by petitioner. No doubt a system of comprehensive Government control over the distribution of all steel products can be hypothesized that would assure priority to essential uses, but the fact is that no such system is now in being or could be created in time to serve the present emergency.

4. In the end, petitioner does seem to accept, at least alternatively, the view that economic disruptions could be sufficiently serious by themselves to impair the "national health or safety." It contends, however, that serious damage has not yet been done and that the President should have waited two or three more months before invoking the national emergency provisions of the Act.[*] The suggestion has no merit. The statute itself contemplates the invocation of the national emergency provisions, not merely to reach a past or existing catastrophe, but to prevent a clearly foreseen threat. The statute plainly and unequivocally states that a national emergency strike is one which, "* * * if permitted to occur or to continue, *will* imperil the national health or safety * * *" (§ 208(a)(ii)). (emphasis added). This preventive reach of the statute alone comports with good sense. Surely, the President should not be required to wait until total paralysis, both in defense production and economic life, has already occurred.

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[*] For example, Robert Nathan expressed the belief that we can accept safely "a delay of a few months", a "temporary delay", a "period of months", and, finally, a delay for the "short-run" (R. 70, 81, 87).

III. TO ENJOIN A STRIKE IMPERILING THE NATIONAL HEALTH AND SAFETY THE COURT IS NOT REQUIRED TO FIND THAT THE INJUNCTION WILL FACILITATE SETTLEMENT OF THE LABOR DISPUTE

The dissenting opinion of Judge Hastie does not disagree with the conclusions of the majority as to the constitutionality of the statute and the sufficiency of the factual showing that continuation of the strike imperils the national health and safety (App. A, *infra*, p. 86). In Judge Hastie's view, the statute imposes upon the courts the duty of determining whether or not issuance of an injunction would facilitate voluntary settlement of the strike by the parties: "* * * a court should not act absent some showing that it will be aiding a negotiated settlement" (App. A, *infra*, p. 93). Examining the affidavits submitted to the district court, Judge Hastie concluded: "The evidence here shows that an injunction would not facilitate and might even make more difficult a negotiated settlement of the steel strike. In these circumstances an exercise of sound discretion must lead to a denial of the requested injunction" (App. A, *infra*, p. 86).

1. The difficulty with the dissenting opinion is that it entirely misconceives the structure and design of the emergency injunction provisions of the statute and the role of the courts in relation thereto. Congress plainly did not intend the courts, in determining whether the statutory conditions exist for issuance of injunctive relief, to exercise a judgment whether such an injunction would be in aid of the collective bargaining process. To the extent that questions of policy are involved, it is Congress which has resolved

them. It is Congress which has made the determination that the national interest requires a temporary cessation of a concerted work stoppage where the conditions prescribed by the statute are found to exist.

Of course, as the legislative history makes abundantly clear, the statutory provisions reflect the view of Congress that, during the suspension of the strike, negotiations between the parties would proceed and the strike might thus be terminated through voluntary settlement. On Judge Hastie's interpretation of the statute, however, it would become a justiciable issue, in every case where an injunction is sought, whether the injunction would enhance or diminish the prospects of settlement. If this is an issue which the court must decide before granting or denying an injunction, the parties would be obliged to present "evidence" upon which such a determination could be based. Necessarily such "evidence" would consist wholly of conjecture and speculation as to the potential impact of an injunction on the situation and the parties and their relative bargaining strength. The proceeding before the court would be turned into an elaborate guessing game as to what might or might not happen if an injunction were to issue. But, as Judge Biggs pointed out, "In this respect no judge or tribunal can foretell the future" (App. A, *infra*, p. 86). Congress was fully aware of the realities of the collective bargaining process, and it is inconceivable that it intended to put upon the courts the burden of conducting such a gossamer inquiry. We submit, on the contrary, that in any case where the required emergency conditions are found to exist, the policy deter-

mination that an injunction would serve the national interest is to be found in the statute and is not an issue for the court. If a court were to undertake in each case to decide for itself whether or not an injunction would be beneficial in furthering the legislative objective, it would become embroiled in a fruitless, time-consuming inquiry—foreign to normal judicial processes—which could only defeat the manifest purposes of the statute, *i.e.*, to bring to a speedy halt a national strike imperiling the national health and safety.

The emergency injunction provisions of the statute were designed, not for the purpose of having the United States throw its weight on one side or the other in the resolution of the controversy, but rather in order to safeguard the safety and health of the Nation from the perils created by prolongation of the strike. Those perils become progressively greater as the strike continues, and the aim of an emergency injunction is to remove those perils, at least for 80 days, while the parties continue to negotiate. Even if in a particular case it might be that the removal of those perils had the incidental consequence of strengthening the bargaining position of one party and to that extent of possibly enlarging the obstacles to voluntary settlement, it is Congress which has decided that the interests of the Nation's health and safety are paramount.

2. Judge Hastie's view that the purpose of the emergency strike provisions of the Act is "not to force strikers to return to work but to facilitate a settlement of a serious industry wide strike by collective bargain-

ing" (App. A, *infra*, p. 86) is, we believe, not supported by anything in the statute or its legislative history. Both indicate, to the contrary, that the very purpose of the provisions was to protect the paramount interest of the public in not having essential production halted by a strike and, to that extent, to subordinate the private interests of the parties to the dispute. That much at least would seem to be established by the declaration of policy in the Act itself that neither management nor labor "has any right * * * to engage in acts or practices which jeopardize the public health, safety, or interest" and that one of the purposes of the Act is "to protect the rights of the public in connection with labor disputes affecting commerce" (§ 1(b)).[29]

Nor are the operative provisions of the Act consistent with Judge Hastie's views. Were an injunction justified only if it would promote a negotiated settlement of the strike, surely the President would be directed to appraise that possibility before seeking an injunction. Yet the statute makes peril to the national health and safety the *only* criterion to be considered by the President (§ 206). Similarly, the board of inquiry, specifically constituted to inquire into the status of the dispute and the body in the best position to appraise the effect of an injunction on the bargaining process, is specifically told only to report

[29] See also the conference report on the final bill, noting that one of the purposes of the Act was "to recognize the paramount public interest in labor disputes affecting commerce that endanger the public health, safety, or welfare * * *." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 1.

on the facts of the dispute and the positions of the parties, not to make any judgment on the efficacy of the injunction to settle the dispute. And § 208, although expressly requiring the court to find whether the national health or safety is imperiled, contains nothing to suggest that the court is to appraise the likelihood that the injunction will promote or hinder the settlement or is to weigh the settlement prospects against the peril to the national health and safety. Finally, if an injunction were authorized only where it could be shown to afford a favorable climate for continued bargaining, there is no reason why its use should be limited to strikes which imperil national health and safety; there is just as much reason to promote peaceful negotiated settlements in any dispute.

The general policy adopted in the Act was, of course, to leave the parties to settle their differences by free collective bargaining without governmental interference. The emergency provisions are an exception to that policy and can hardly be explained as reflecting a belief that an injunction is a good way to settle strikes, a complete reversal of the general policy. Rather, they reflect a judgment that the freedom of the parties to engage in strikes or lockouts, though generally the best way to settle disputes, cannot be allowed to imperil the much greater interest of the public in preserving the national health and safety. That dominant policy pervades the legislative history of the emergency provisions. Thus, the Senate committee report on the bill states that while the role of the Federal Government in most labor disputes "should be limited to mediation, we recognize that the

repercussions from stoppages in certain industries are occasionally so grave that the national health and safety is imperiled" and that the Government should "have the power to intervene and secure judicial relief when a threatened strike or lock-out is conducted on a scale imperiling the national health or safety." S. Rep. 105, 80th Cong., 1st Sess., pp. 14–15. Commenting on the 80-day limitation, the Committee stated: "In most instances the force of public opinion should make itself sufficiently felt in this 80-day period to bring about a peaceful termination of the controversy. Should this expectation fail, the bill provides for the President laying the matter before Congress for whatever legislation seems necessary to preserve the health and safety of the Nation in the crisis" (*id.* at 15). While the Committee report thus reflects a hope that the strike will be settled during the injunction, it states it only as a hope and in no way implies that a prognosis of such a settlement has any bearing on the issuance of the injunction; on the contrary, it stresses entirely the overriding need that such strikes be stopped when they imperil the national health or safety, regardless of the effect of the injunction on the parties.[30]

[30] The debates in the House and Senate on the emergency provisions were entirely in terms of the overriding public interest in avoiding the effects of the work stoppage. Senator Ball, for example, explained that the purpose of the provision "is primarily to protect the public, which is always the secondary sufferer in strikes, no matter how small they may be, and in the industry-wide strikes often becomes the major victim." *Legislative History of the Labor Management Relations Act, 1947* (G.P.O. 1948), p. 1496. For similar statements, see *id.*, 586–587, 669, 868, 882, 905, 913, 926, 1008, 1145, 1518, 1523.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1959.

Appendix A

United States Court of Appeals
for the Third Circuit

No. 13,056

United States of America

v.

United Steelworkers of America, et al.

United Steelworkers of America, appellant

Present: Biggs, *Chief Judge*, and Goodrich, McLaughlin, Staley, Hastie and Forman, *Circuit Judges*

OPINION OF THE COURT

(Filed October 27, 1959)

PER CURIAM.

In accordance with the practice of this court the opinions in this case were circulated among the members of the court who did not comprise the panel in this case to determine whether they desired rehearing. Judge Kalodner excepted since he disqualified himself. Rehearing is ordered when a majority of the court so votes.

In view of the emergent circumstances of the case the members of the court who did not sit now express their views in respect to rehearing as follows. Judge

McLaughlin and Judge Staley, because of the views expressed in Judge Hastie's opinion, vote for rehearing *en banc*. Judge Forman votes against rehearing *en banc* because of the views expressed in the majority opinion. Since the court is equally divided there will be no rehearing.

United States Court of Appeals for the Third Circuit

No. 13,056

UNITED STATES OF AMERICA,

v.

UNITED STEELWORKERS OF AMERICA, [ET AL.]

* * * * *

UNITED STEELWORKERS OF AMERICA, APPELLANT

Appeal from the United States District Court for the Western District of Pennsylvania

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Argued October 22, 1959

Before BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed October 27, 1959)

By BIGGS, *Chief Judge*.

The suit at bar was instituted by the United States, *parens patriae*, against United Steelworkers of

America (the "Union"), an unincorporated labor union, representing, among others, employees in the steel industry, which is engaged in trade, commerce, and transportation among the several States and with foreign nations and in the production of goods for commerce as defined by the Labor-Management Relations Act, 1947, as amended, 29 U.S.C.A. § 141 *et seq.*, 61 Stat. 136 *et seq.* The defendants, ninety-six in number, (the "Steel Companies") are variously engaged in one or more of the stages of steel production, including the mining and transporting of iron ore, the operation of blast furnaces for the conversion of iron ore into pig iron, the production of steel ingots, the rolling and shaping of steel ingots into steel products and the fabricating of finished products.

Collective bargaining agreements between the Union and the Steel Companies expired on June 30, 1959, and unresolved labor disputes between the Steel Companies and their employees represented by the Union as to the terms and conditions of new agreements resulted in strikes of the employees commencing on July 15, 1959 and continuing until the present time. On October 9, 1959, the President of the United States issued Executive Order No. 10843 creating a Board of Inquiry, 29 U.S.C.A. §§ 176 and 177, to inquire into the issues involved in the labor disputes, and in the Executive Order referred to, stated that in his "opinion" the strike was affecting a substantial part of an industry engaged in trade, commerce and transportation among the several States and with foreign nations and in the production of goods for commerce, and that, if permitted to continue the strikes would imperil the national health and safety. 29 U.S.C.A. § 176. The Board of Inquiry convened and inquired into the issues involved in the labor disputes and made its report as required by law on October 19, 1959.

Upon its receipt the President filed the report with the Federal Mediation and Conciliation Service, making its contents available to the public, and instructed the Attorney General of the United States to institute the instant proceedings in the court below.

That court, after extensive arguments and stipulations by the parties whereby they waived service of process and submitted themselves to the jurisdiction of the court and also agreed that the hearing on the petition and affidavits without oral testimony should be a final one, entered an injunction which ordered the Union and its officers and agents to end the strike and also required the Steel Companies to make their plants available for the Union members so that they might resume work therein. This injunction by the terms of the Act must be dissolved in 80 days, 28 U.S.C.A. § 180. The Union has appealed from this injunction. The Judgment is a final one, 28 U.S.C.A. § 1291. No jurisdictional question in the ordinary sense is presented here.

The Constitutionality of the Statute

We are met *in limine*, however, with a constitutional challenge asserted by the Union as to the capacity of the Court below to act in this matter.[1] The

[1] Although ordinarily we think of federal courts being classified only as District Courts, Courts of Appeals, and the Supreme Court of the United States, there is also another classification of federal courts, that of "constitutional" and "legislative" courts. The former, also known as "Article III courts," are created in accordance with Article III, Section 1 of the Constitution which declares that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." These "constitutional courts" are subject to the jurisdictional restrictions of Article III, Section 2, the most important of which, for present purposes, is the exer-

Union relies on Article III, Section 2 of the Constitution which limits the courts of the United States to the judicial function of adjudicating justiciable controversies, citing National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). Put shortly, it is the contention of the Union that there was no "case or controversy" before the court below which it could adjudicate in the sense required by the Constitution. In this connection the Union points out that Section 178, Title 29, U.S.C.A., states that

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cise of judicial power only in a justiciable "case or controversy," and the judges of these courts have the protection of Article III, Section 1 in that they hold office during good behavior and cannot have their compensation diminished during their continuance in office.

"Legislative" or "Article I courts," on the other hand, do not have such jurisdictional limitations nor do the judges thereof have the protections afforded to judges of "Article III courts." The "legislative courts" are created by Congress as a "necessary and proper" adjunct to its enumerated powers under Article I, Section 8 of the Constitution; such courts may perform legislative and administrative as well as judicial functions. Courts which have been held to be legislative courts include the Territorial courts, the Court of Customs and Patent Appeals, the Customs Court, and the Court of Claims. See 1 Moore, Federal Practice §0.4[3] (2d ed. 1959). The three courts last named, however, have been made constitutional courts by Acts of Congress which need not be detailed here.

The District Courts held in the various States and the Courts of Appeals for the First through the Tenth Circuits are "constitutional courts" as is the Supreme Court of the United States. The United States District Court and Court of Appeals for the District of Columbia Circuit are "legislative courts" for some purposes and "constitutional courts" for other purposes. *Id.* at §0.4[2].

For a general discussion of the legislative-constitutional court dichotomy see Hart & Wechsler, The Federal Courts and the Federal System 340-72 (1953), and 1 Moore, *supra*, at §0.4.

the court "shall have jurisdiction to enjoin any such strike *** *" but, it contends, an injunction can issue lawfully only if it is employed as a remedy to enforce a preexisting legal duty; that here the injunction creates the right and also in the same breath enforces it. The Union relies on the kind of classic equity proceedings where an injunction is issued to prevent the continuance of a tort, to compel performance of a contract, or to enforce a duty already imposed by statute. The Union concedes that both it and the Steel Companies had and have a duty to bargain collectively in good faith and if it had failed to do so sanctions could be imposed upon it under the National Labor Relations Act because of such failure. But the Union argues that while there is a controversy between it and the Steel Companies that controversy was not before the court below in constitutionally justiciable form.

Unfortunately, though the Act is over twelve years old, we have found but one reported case which directly adjudicates this issue of constitutionality under Article III, Section 2; *viz.*, United States v. United Steelworkers of America, 202 F. 2d 132, 138-39 (2d Cir. 1953), affirming United States v. American Locomotive Co., 109 F. Supp. 78 (W.D. N.Y. 1952), cert. denied, 344 U.S. 915 (1953) (Certiorari in this case was applied for and denied prior to the adjudication in the Court of Appeals). Cf. Youngstown Co. v. Sawyer, 343 U.S. 579, 586 (1952).[2]

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[2] There are, however, some thirteen other cases cited in the brief of the United States in which the provisions of Section 178, Title 29, U.S.C.A., were enforced seemingly without constitutional questions being raised. They are as follows: United States v. Carbide and Carbon Chemicals Corp., Civil No. 1098, E.D. Tenn., March 19, 1948 (no opinion); United States v. National Maritime Union (CIO), Civil No. 46-299, S.D. N.Y.

We think it desirable to examine this question *de novo*. It is clear that Sections 176–180 of the Act, 29 U.S.C.A., embody and attempt a legislative solution of problems rising from labor disputes which lead to strikes or lockouts and which, because of their serious impact on national health or safety, may give rise to national emergencies. There was a clear-cut recognition by Congress that labor strife affects adversely important economic and social interests of the public. This appears from the National Labor Relations Act itself enacted long prior to the Labor-Management Relations Act with which we are immediately concerned. The latter Act appears to have two major objectives and it is not necessary to decide here which has primary or secondary status. Congress intended the Labor-Management Relations Act to operate by

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June 11, 1948 (unreported); United States v. National Maritime Union (CIO), Civil No. 25686, N.D. Ohio, June 11, 1948 (no opinion); United States v. International Longshoremen's and Warehousemen's Union (CIO), 78 F. Supp. 710 (N.D. Cal. 1948); United States v. International Longshoremen's Ass'n (AFL), Civil No. 47 157, S.D. N.Y., Aug. 24, 1948 (no opinion); United States v. International Union, United Mine Workers, 77 F. Supp. 563 (D. D.C. 1948), appeal dismissed and aff'd in part 177 F. 2d 29 (D.C. Cir.), cert. denied 338 U.S. 871 (1949); United States v. International Union, United Mine Workers, 89 F. Supp. 187 (D.D.C. 1950); United States v. International Union, Mine, Mill and Smelter Workers, Civil No. 3675, D. Colo., Sept. 5, 1951 (no opinion); United States v. International Longshoremen's Ass'n, 116 F. Supp. 255, 262 (S.D. N.Y. 1953); United States v. Union Carbide and Carbon Corp., Civil No. 2456, E.D. Tenn., Aug. 27, 1954 (unreported); United States v. International Longshoremen's Ass'n, 147 F. Supp. 425 (S.D. N.Y. 1956); United States v. Goodyear Atomic Corp., Civil No. 3394, S.D. Ohio, May 15, 1957 (no opinion); United States v. International Longshoremen's Ass'n, Civil No. 151 280, S.D. N.Y., Oct. 8, 1959 (unreported).

its terms when a strike "affects an entire industry or a substantial part thereof * * *" and "will imperil the national health or safety * * *" 29 U.S.C.A. § 178.

The purposes of the Act are set out in Section 141(b) as follows: "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations * * * recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest."; and "It is the purpose and policy of this * * * [Act], in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

The Congressional intent shown here is, first, to protect the rights of both employers and employees and, second, to bring to an end industrial strife which affects commerce to such a degree as to menace the general welfare. See 29 U.S.C.A. Sections 178 and 179. Whether or not the injunction appealed from has or can have the effect of settling the instant labor dispute depends on the proof offered and goes to the issue of the sound exercise of legal discretion on the

part of the court below. This phase of the case is discussed at a later point in this opinion.

It may be helpful to restate in a few concrete sentences our conception of the congressional intent as expressed in the Act. The underlying concept is one of tort, tortious conduct which affects the national health or safety. See Section 141(b), quoted *supra*. That tortious conduct consists of permitting a labor dispute to continue to the point where national health or safety is imperiled. In point of time the action or non-action of employers and employees becomes wrongful when national health or safety is imperiled. The President then states his opinion that such is the case and constitutes a Board of Inquiry which proceeds as required by law but without recommendations, the making of recommendations being expressly prohibited by Section 176, 29 U.S.C.A. The United States then brings a suit such as that at bar and it becomes the duty of the District Court to find or not to find that the circumstances are such, as prescribed in Section 178, that the national health or safety is imperiled. It would, of course, be impossible ordinarily to fix the exact point in time at which the provisions of the Labor-Management Relations Act becomes operative. The peril must exist at the time the jurisdiction of the United States District Court is invoked and it is the duty of the court in the exercise of its sound legal discretion under the Act to issue an injunction if it finds the necessary operative facts.[3]

In respect to the constitutionality of the Act, the Court of Appeals for the Second Circuit in United States v. United Steelworkers of America, *supra*, at

[3] We point out again that Section 178(a)(ii) provides that the "court shall have jurisdiction to enjoin such strike * * *."

p. 139, said: "The statute creates the right on the part of the public to be protected from the danger of such a strike or lock-out. Whether there is an existing or threatened strike or lock-out which, under the statute, is an invasion of the rights of the public, presents the usual kind of case or controversy which is justiciable by a court."

In United States v. International Longshoremen's Ass'n, 116 F. Supp. 262, 265 (S.D. N.Y. 1953), Judge Weinfeld said: "In exercising jurisdiction under the National Emergencies provisions of the law, the Court acts in the public interest and not in the adjudication of private rights of the contending parties." It is difficult to quarrel with the congressional objectives.

The legislative history supports our view as to the purposes of the Labor-Management Relations Act. It is true, as the Union points out, that the legislation now embodied in Section 178 as it was originally proposed in the House of Representatives had broader scope. Under it the President would have had the power to seek an injunction whenever "a labor dispute has resulted in, or imminently threatened to result in, the cessation or substantial curtailment of interstate or foreign commerce in transportation, public utility, or communication services essential to the public health, safety, or interest,"[4] but in the Senate version, which became what is now Section 178, Senator Taft limited the applicability of the emergency provisions of the statute to situations in which the national "health or safety" was or might become imperiled. But the legislation as enacted nonethe-

[4] See H.R. 3020, Section 203(a), 80th Cong., 1st Sess. See also "Legislative History of the Labor-Management Relations Act, 1947" (2 Vols.) published by National Labor Relations Board.

less seems to us to amply embrace the present circumstances.

We are here concerned with the giving of relief by a court of equity in a situation which is alleged to have impaired and seriously menaces the public interest. Cf. Railroad Commission v. Pullman Co., 312 U.S. 496, 500 (1941), and Virginian Ry. Co. v. System Federation, 300 U.S. 515, 552 (1937). The circumstances of the case at bar are somewhat analogous, albeit in different terms, to those in In re Debs, 158 U.S. 564, 583–590 (1895). In the cited case the United States was held to have *locus standi,* in effect as *parens patriae,* to maintain a proceeding in the nature of a suit to abate a public nuisance. This is a classic field for the interposition of the powers of a court of equity.

Without placing blame upon any of the defendants here, the Union or the Steel Companies, it is alleged, and the government insists that it has proved, that their failure to reach an agreement by the processes of collective bargaining has caused them, and it is feared their country with them, to fall into a slough from which it is necessary to lift them, if only for an 80-day period, lest national health and safety be imperiled. The use of the injunction in a labor dispute, so frequently abused in years past, led to the passage of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101–115, which prohibited the injunction in a bona fide labor dispute. But the Labor-Management Relations Act specifically has limited the exemption against injunctions in labor disputes granted by the Norris-LaGuardia Act. See Section 178(b), 29 U.S.C.A. However undesirable we may deem the use of the injunction in labor disputes to be, nonetheless Congress has seen fit to reinstate it to the limited degree indicated. The old law of the injunction in the labor dispute, to the

extent prescribed, seems to have been returned by Congress to at least part of its former standing and we are compelled to adhere to the posture which Congress has placed upon it.

Historically injunctions in labor disputes dealt with the status of groups, sometimes large groups, of employees. Such decrees may perhaps be described, not entirely inaptly, as "status" judgments. Groups of employees were ordered to return to work or face contempt proceedings. Rarely was an employer subject to a decree preventing lockouts, but this is beside the point. When a court enters a status judgment such as that at bar, in our opinion it acts judicially and not legislatively. If this were not so a substantial portion of the jurisdiction granted to courts of the United States by Congress would fall within the interdiction of Article III, Section 2, of the Constitution. Orders of the National Labor Relations Board frequently would come into such a category, as would orders of the Securities and Exchange Commission, as well as orders of the Interstate Commerce Commission reviewable by the United States district courts under the Urgent Deficiencies Act. Petitions for review of decisions of the United States Tax Court would also fall within the interdiction. Proceedings to require the issuance of a patent by the Commissioner of Patents under R.S. 4915 would also meet the ban, Morgan v. Daniels, 153 U.S. 120 (1894), as would proceedings for naturalization. Tutun v. United States, 270 U.S. 568 (1926). Cf. McGrath v. Kristensen, 340 U.S. 162, 167–168 (1950). The line dividing the powers of the legislative tribunal as distinguished from those of the judicial tribunal is of necessity a fine one.

We conclude that the court below was called upon to make and did make a judicial rather than a legis-

lative type of judgment. Our conclusion in this regard is confirmed, we think, by contrasting the statute as enacted with the House proposal which was rejected. The House would have called upon a district court to act whenever in its judgment the public interest was imperiled. This would have left the court at large in deciding the expediency of action guided only by statesmanlike conception of the public welfare. But, as enacted, the statute requires decision whether the evidence adduced in a case shows serious interference with essential national defense activities or threatened impairment of public health. See note 4, *supra*. This is specific enough and factual enough to bring the inquiry within the area of judicial decision as distinguished from legislative judgment, as in our policy the two are distinguished.

We are of the opinion, for the reasons stated, that the proceeding at bar does constitute a justiciable controversy and does not incur the interdiction asserted by the Union to arise under Article III, Section 2, of the Constitution.

Findings of Fact by the Court Below

All the necessary jurisdictional facts were found by the court below in its findings of fact, Nos. 1 to 16, inclusive. Findings Nos. 9, 10, 11, 12, 13, 15 and 16, however, are set out in this opinion for the benefit of the reviewing Court. They are as follows:

> 9. The strike on the part of the Union resulted from unresolved labor disputes between defendant employers, who are engaged in one or more of the various stages of steel production, including the mining and transport of iron ore by railroad or vessel, the operation of blast furnaces for the conversion of iron ore into pig iron, the production of steel ingots, the rolling and shaping of steel ingots into various shapes

and forms of steel products, and the fabricating of certain finished products, and certain of their employees represented by the Union.

10. The Board of Inquiry made an investigation of the issues and attempted to have the defendants resolve the dispute by free and collective bargaining. These efforts on the part of the Board of Inquiry were unsuccessful and the disputes remain unresolved.

11. The report of the Board of Inquiry concludes that "the parties have failed to reach an agreement and we see no prospects for an early cessation of the strike. The board cannot point to any single issue of any consequence whatsoever upon which the parties are in agreement." Unless the Court grants the injunction sought by the United States the strike will continue for an indeterminate period.

12. The strike affects a substantial part of the steel industry of the United States, which is engaged in trade, commerce and transportation among the several States and with foreign nations and in the production of goods for commerce.

13. The strike, which commenced on July 15, 1959 and has continued until the present time, has resulted in the closing on July 15, 1959 of facilities producing at least 85% of the total steel production of the United States. Inventories of steel have dropped from 24,800,000 tons on July 15, 1959 to approximately 10,000,000 tons. This is below the normal inventory level and is below the level required to sustain continued production of industries and businesses dependent upon steel products. Approximately 500,000 striking members of the Union are now unemployed and more than 265,000 employees are idle in other industries by reason of the steel strike. The 765,000 unemployed support families numbering over 2,000,000 persons. If the strike were to continue, the total number of workers made

idle by it would probably reach approximately 1,775,000 by the end of November and approximately 3,000,000 by the end of December. By that time more than 9,000,000 people would probably be affected by the strike.

15. The strike, which has now been in existence for more than 95 days, if permitted to continue, will imperil the national health and safety in the following respects:

(a) Certain items of steel required in top priority military missile programs of the United States are not made by any mill now operating, nor available from any inventory or from imports. Any further delay in resumption of steel production would result in an irretrievable loss of time in the supply of weapons systems essential to the national defense plans of the United States and its allies.

(b) The planned program of space activities under the direction of the National Aeronautics and Space Administration has been delayed by the strike and will be further delayed if it is continued. Specifically, project MERCURY, the nation's manned satellite program, which has the highest national priority, has been delayed by reason of delay in construction of buildings essential to its operation. This program is important to the security of the nation. Other planned space programs will be delayed or threatened with delay by a continuation of the strike.

(c) Nuclear Submarines and the naval shipbuilding program other than submarines, including new construction, modernization, and conversion, have been affected by reason of the inability to secure boilers, compressors, and other component parts requiring steel. Products of the steel industry are indispensable to the manufacture of such items and delay in their production will irreparably injure national defense and imperil the national safety.

(d) Exported steel products are vital to the support of United States bases overseas and for the use of NATO allies and similar collective security groups. The steel strike, if permitted to continue, will seriously impair these programs, thus imperiling the national safety.

(e) A continuation of the strike will have the ultimate effect of adversely affecting millions of small business enterprises, almost all of which are directly or indirectly dependent upon steel products and most of which lack the resources to stock large inventories. In addition, it will have the effect of idling millions of workers and a large proportion of the facilities in industries dependent upon steel for their continued operation. Manufacturing industries directly dependent on steel mill products account for the employment of approximately 6,000,000 workers and normal annual wages and salaries totalling approximately $34,000,000,000. The products of these industries are valued at over $125,000,000,000. The national health will be imperiled if the strike is permitted to continue.

16. Such results, if the strike is permitted to continue, will imperil the national health and safety and thereby cause irreparable damage and injury to the United States of America for which there is no adequate remedy at law.

Proof

This case was submitted to the court below on affidavits and without oral testimony. This method was agreed to by both sides. The result of this method of proof is that the rule which calls upon us to support the findings of the district judge unless clearly erroneous is inapplicable so far as it has to do with the trial court's opportunity to observe the

demeanor of the witnesses and like matters. Fed. R. Civ. Proc. § 52(a), 28 U.S.C.A. Moreover, it necessarily deprives the instant record of any elaboration of the evidence of the various affiants which could have been brought out had they appeared in person as witnesses and had been subjected to examination and cross-examination in the usual fashion.

The Union contends that the contents of these affidavits are insufficient to bring the case within the reach of the Labor-Management Relations Act. It points out that the scope of Section 178, 29 U.S.C.A., is limited to situations which will imperil "the national health or safety". The Union says that the country, despite the strike, is prosperous, and that a comparatively small part of the steel output is needed for national defense work and that the steel required for "health" in order to meet the needs of hospital construction and the like is very limited indeed. Moreover, asserts the Union, if the United States needs more steel for any particular defense use or uses, the Union, so far as it has power to do so, will cooperate patriotically in seeing that the necessary supply of steel is forthcoming. Furthermore, the Union shows that there is still a good-sized inventory of steel on hand, that steel is available from foreign sources, and that any contention that the industrial dispute with which we are concerned is imperiling the safety and health of the nation is unrealistic because there is no immediate threat of harm.

That portion of the Union's argument that centers attention on today's calm rather than on tomorrow's approaching storm is not well taken. The words of Section 178(a)-(ii) speak to the future; viz., "If [the strike is] permitted * * * to continue [it] will

imperil the national health or safety", as has been repeatedly pointed out, is the pertinent phrase. How far into the future may the United States and the courts look? The Act contains no definition. But there is testimony in the record that the current supplies of steel are very rapidly diminishing. Nor does the proffer of the Union's assistance to get a plant or plants open help much here. The steel industry is too vast and too complicated to be segmented so as to make such a desirable result practicable.

The affidavit of Dr. Raymond J. Saulnier, Chairman of the Council of Economic Advisers, comments cogently on the Union's suggestion that there be a selective reopening of a small number of mills to meet national defense needs. Dr. Saulnier states:

> Steel is not chemically or physically uniform; its products comprise a vast variety of items, made and further processed in specialized facilities of many different mills and plants. * * * Steel is produced through closely interrelated processes that often cannot be separated technically or economically to allow production of items "needed" * * * omitting items "not needed." On this point, the Business and Defense Services Administration of the Department of Commerce declares that "in order to satisfy defense requirements alone from the standpoint of size, grade, and product, it would be necessary to reactivate 25 to 30 hot rolling mills together with supporting blast furnaces, and Bessemer, electric, open hearth and vacuum-melting furnaces. Additional facilities for pickling, coating, heat treating, cold finishing, shearing, cutting, testing, and the like would also be required. To reopen these plants for the production of steel products to meet only defense requirements would be totally impracticable. The problems of scheduling the

limited tonnages involved, plus the cost and technical difficulty of start-ups and shut-downs would appear to be insurmountable.

* * * * *

Obtaining adequate supplies of * * * essential civilian items of steel, like obtaining steel for defense purposes, would clearly require the reopening of more than just a few mills. It would also require the reopening of many related facilities for supplying the component materials of steel-making and for processing, finishing, and distributing steel products.

Even if it were technically possible to resume steel production on this selective basis, to do so would be exceedingly uneconomic and wasteful. Presumably the Federal Government would be required to underwrite some part of the costs of such a wasteful operation of facilities. For government to undertake such a grotesque, inefficient and costly organization of our steel-producing facilities by reason of a national strike would be offensive to the public conscience, as well as to the public interest.

Other affiants are cabinet officers or the heads of government departments. It is true that some of the statements in the affidavits represent conclusions on facts rather than statements of present facts and of necessity they contain some element of prognosis. These witnesses were entitled to look to the future for the Act itself so looks. Moreover, as was necessarily admitted at the argument before this court, these cabinet officers and department heads speak as experts in their fields of governmental operations. As experts the affiants were entitled to state conclusions as well as facts for the benefit of the court below. The court below was entitled to weigh their testimony in a different light from that of a witness who testi-

fies that a motor car was or was not on a portion of the highway where it did not lawfully belong.

The affidavits referred to contain strong statements indicating that the effect of a prolongation of the present strike would definitely imperil the national health and safety and that disaster must ensue if the strike continues. Secretary of Commerce Mueller stated:

> Steel plays a role in our economy and in our lives that is crucial in the most literal sense of the word. Indeed, the use of steel in our economy is so pervasive and important that our whole system of production and distribution and our national security, health, and safety are being seriously impaired by the prolonged interruption in its availability.
>
> * * * * *
>
> In response to Department of Defense requests for aid in the procurement of items not currently being produced, the Department of Commerce has been unable to carry out its responsibility to be of assistance. It is clear that a continuation of the steel strike will lead to extended delays in military construction and production, including the missile and satellite programs.
>
> * * * * *
>
> The steel strike if permitted to continue will seriously impair our security and defense program, thereby imperiling the national safety.
>
> * * * * *
>
> * * * it is my opinion that the aforesaid strike, if permitted to continue, will do irreparable damage to our foreign trade, to our domestic trade and to our defense posture. It will therefore seriously imperil the national health and safety.

Acting Secretary of Defense Gates was no less positive in what he had to say:

> I can state unequivocally of my knowledge that steel is one of the most essential elements in the national defense program of the United States and that beyond a certain point of delay in normal deliveries there occurs an irreparable injury to the national defense and consequently to the national safety.
>
> In my opinion and in the opinion of those persons in the armed services who have the greatest knowledge of these matters, such a point has now been reached and any further delay in resumption of steel production would result in an unretrievable loss of time in the supply of weapons systems essential to the national defense plans of the United States and its allies.
>
> * * * *
>
> Three basic ballistic missile weapon systems are the ATLAS, TITAN, and POLARIS. Of these the first two require land based launching sites involving both above and below ground facilities using large quantities of special steels. The POLARIS weapon system includes not only the missile itself but, as well, a special design of nuclear submarine for launching. In the unique design of these weapons are the facilities which are required to make them operational. A significant portion of the steel specified in the procurement contracts is of a composition not common to commercial usage nor available from existing civilian inventories by exercise of allocation or eminent domain powers of the Government.
>
> In addition to the necessity for special alloys and steel compositions, these programs in many cases require special sizes and shapes, many of which can be fabricated only by firms having long experience in their production and the

necessary special facilities therefor. In summary, the shortage of steel for the missile program is not a problem solvable by the mere exchange of other types and forms of steel available in inventories still existing for other purposes or in commercial stocks.

* * * * * *

In my opinion and in the opinion of those charged with responsibility for the completion of these programs, the delays which have now occurred are only a foretaste of the increasingly greater delays to come if immediate resumption of work in the steel plants does not occur. The lag time to reach production, the further time required to transport the steel to the fabricator, and the delay occurring thereafter before delivery of the finished component creates a situation where the future scheduling of defense supplies is subject not only to existing but to future indeterminate delay.

* * * * * *

Each day the strike continues will, in my opinion, add further examples of serious consequences to the shortages now existing and will adversely affect the national defense and imperil the national safety.

Secretary of Labor Mitchell stated that:

* * * it is my opinion that this strike will, if permitted to continue, seriously imperil the National health and safety.

Deputy Administrator Dryden of the National Aeronautics and Space Administration, commented on the effect of the strike on the nation's space program.

As the result of information which I have thus received, it is my opinion that the current strike affecting the steel industry has had an adverse

> effect on accomplishment of the presently planned program of space activities. This opinion is based upon the specific examples described * * *.

General Manager Luedecke, of the Atomic Energy Commission, referred to the effect of the strike on that agency's program.

> Continuity of operation of the Atomic Energy Commission's programs is essential to the national defense. The Commission or its contractors have had on hand or procured sufficient supplies so as not to have been materially affected by the steel strike in construction or repair projects, up till now. However, the strike has already produced delays, so far of a minor nature, in nine military or civilian projects located in California, New Mexico, Nevada, Ohio, New York, and Idaho; and should the strike continue unabated, it would induce a spreading slowdown in construction projects resulting in irretrievable delay * * *. If the strike continues into early 1960, there would be an appreciable effect upon the weapons program.

We have examined carefully the contents of the affidavits submitted by the Union. Variances as they exist between these affidavits and those of the United States are created largely by different avenues of approach. We find no variances in the affidavits basically material to the findings made by the court below or to the issues with which we are immediately concerned.

On a review of the entire record we conclude that we cannot say that the findings made by the court below are clearly erroneous.

The Injunctive Remedy.

The Union argues that even if it be assumed that the findings of the court below are not clearly erroneous an injunction is far too sweeping a remedy for the ills which the court found will result from the continuance of the strike. It points out that the provisions of Section 178(a)(ii), 29 U.S.C.A., merely gave to the court below "jurisdiction to enjoin". The United States contends that on the findings of the court below which we have approved the injunction must issue and that the case presented is so strong that a court of equity would be in error if it refused to give the relief prayed for. In short, the Union contends that the court below in granting the injunction abused its legal discretion and the United States asserts that if the court below had not granted the injunction the refusal would have been a breach of discretion.

A portion of the Union's argument in this regard is that there are other statutes which could have been employed by the United States adequately to relieve any danger to the national health or safety and which would have called for a much less drastic remedy than the injunction appealed from. This is a consideration which a court of equity of necessity must weigh.

The Union points out that Section 101(a) of the Defense Production Act of 1950 as amended, 50 U.S.C.A. App. § 2071(a) (Supp. 1958), authorizes the President:

> "* * * (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of

> assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

Additionally, Section 708, 50 U.S.C.A. App. §2158, of the same Act authorizes the President:

> * * * to consult with representatives of industry, business, financing, agriculture, labor, and other interests, with a view to encouraging the making by such persons with the approval by the President of voluntary agreements and programs to further the objectives of this Act.

The stated policy of the Act is "to provide for the national defense and national security". Sec. 50 U.S.C.A. App. 2062 (Supp. 1958).

Finally, the Order refers to Section 18 of the Universal Military Training and Service Act, 50 U.S.C.A. App. 468, which provides:

> Whenever the President after consultation with and receiving advice from the National Security Resources Board determines that it is in the interest of the national security for the Government to obtain prompt delivery of any articles or materials the procurement of which has been authorized by the Congress exclusively for the use of the armed forces of the United States, or for the use of the Atomic Energy Commission, he is authorized, through the head of any Government agency, to place with any person operating a plant, mine, or other facility capable of producing such articles or materials an order for such quantity of such articles or materials as the President deems appropriate. Any person with whom an order is placed pur-

suant to the provisions of this section shall be advised that such order is placed pursuant to the provisions of this section * * *.

(c) In case any person with whom an order is placed pursuant to the provisions of subsection (a) [of this section] refuses or fails—

* * * * *

(2) to fill such order within the period of time prescribed by the President or as soon thereafter as possible as determined by the President;

* * * * *

the President is authorized to take immediate possession of any plant, mine, or other facility of such person and to operate it, through any Government agency, for the production of such articles or materials as may be required by the Government.

We cannot accept the Union's argument in this respect. If our conclusion is correct that there is sufficient evidence in the record of the present or future danger to national health or safety, we conclude that the danger is great enough and calls for a remedy as sweeping as the law will permit. Whether the remedy provided by the Labor-Management Relations Act is sufficient to accomplish a cessation of labor strife is a question not for this court but for Congress. We conclude, therefore, that the court below did not abuse its discretion in granting the relief which the United States prayed for.

But there is another consideration here which is of vital consequence on the issue of the sound exercise of legal discretion by the court below. Section 179, 29 U.S.C.A., provides the machinery to be employed during the 80-day injunction period for the adjustment by the parties of their differences. This most important portion of the statute provides that it shall be "the duty

of the parties to the labor dispute * * * to make every effort to adjust and settle their differences" with the assistance of the Service created by the Act. It further provides that upon the issuance of the injunction the President shall reconvene the Board of Inquiry which previously reported in respect to the labor dispute and at the end of a 60-day period, unless the dispute meanwhile has been settled, the Board of Inquiry shall report to the President the current position of the parties and the efforts which have been made to settle the dispute including a statement "of the employer's last offer of settlement". The President is required by law to make that report available to the public. Last, but by no means least important, Section 179 provides that the "National Labor Relations Board, within the succeeding 15 days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer", and that the National Labor Relations Board shall certify the results to the Attorney General of the United States within five days thereafter.

If the injunction does not issue the machinery designed by Congress to effect an end to the labor strife, which as we have indicated is one of the prime purposes for which the statute was enacted, cannot be employed, and the menace to national health or safety, the other prime statutory purpose, perhaps cannot be abated. Congress has designed this machinery and has settled the policy embraced in the Labor-Management Relations Act. While the court below in the exercise of its sound legal discretion might have found that the exercise of the provisions of Sections 178 and 179, 29 U.S.C.A., would be ineffectual, rather than efficient, to quell labor strife and obviate the menace

to national health or safety, in the light of all the circumstances we cannot say that in issuing the injunction the trial court abused its sound legal discretion. In this respect no judge or tribunal can foretell the future.

The judgment of the court below will be affirmed. Our stay order will be continued for a period of six days to allow aggrieved parties, should they desire to do so, to petition the Supreme Court for *certiorari*. Any further stay must come from the Supreme Court.

HASTIE, *Circuit Judge*, dissenting.

Without challenging the conclusions of the majority as to the constitutionality of the statute and the sufficiency of proof that the continuing national steel strike imminently threatens serious interference with essential national defense production, I still am not persuaded that a case has been established for the issuance of a Taft-Hartley injunction.

These are the steps in my reasoning. The injunction sought here is an equitable remedy and, therefore, is to be granted or withheld in the exercise of a sound discretion. Accordingly it should not be granted if it apparently would not accomplish its objective. In the emergency strike provisions of the Taft-Hartley law, the primary purpose of a temporary injunction is not to force strikers to return to work but to facilitate a settlement of a serious industry wide strike by collective bargaining. The evidence here shows that an injunction would not facilitate and might even make more difficult a negotiated settlement of the steel strike. In these circumstances an exercise of sound discretion must lead to a denial of the requested injunction. This reasoning is elaborated in what follows.

The national emergency strike provisions of the Taft-Hartley Act, 29 U.S.C. §§ 176–180, do not purport to determine the merits of a labor dispute or to terminate a strike by judicial order. The statute merely authorizes a court temporarily to suspend a strike of a certain nationally very harmful type[1] for a period of not more than eighty days while the parties negotiate and the strikers ultimately vote whether to accept whatever final offer management may make. This duty to negotiate and vote is explicit and constitutes the whole machinery of settlement set up by the statute. Thus the apparent purpose of the statute is to create for a limited time a more favorable environment for collective bargaining between the parties to a nationally hurtful strike with the hope and expectation that bargaining and related procedures, outlined in Section 179 of Title 29, will accomplish a settlement of the strike.

It is true that a Taft-Hartley injunction may also have the immediately helpful effect of temporarily restoring much needed production. But if this had been the objective primarily in view, there would have been no reason for limiting the term of the injunction to an eighty day period of attempted settlement. Reflecting his primary concern with achieving a negotiated settlement, Senator Taft, the principal sponsor of the legislation, explained its philosophy to the Senate in these words:

> We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbi-

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[1] Presumably it is only when a strike imminently and seriously threatens very important national interests that an exception is made to the general policy of non-interference by federal courts in labor disputes.

tration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. 93 Cong. Rec. 3951.

It is also to be considered in judging the primary purpose of the legislation that Congress had already conferred sweeping and more direct authority upon the Executive for satisfying emergency national needs for materials and commodities by seizing struck plants under Section 18 of the Universal Military Training and Service Act[2] and by allocating scarce supplies under Section 101 of the Defense Production Act of 1950 as amended.[3] It is reasonable to believe that some different purpose motivated the Congress in authorizing temporary injunctions under the Taft-Hartley law.

To accomplish its purpose the statute invokes the equity jurisdiction of the district courts. This is done by the provision that if the continuation of a strike of a substantial part of an industry will impair national health or safety, the district court "shall have jurisdiction to enjoin any such strike [for a period which cannot exceed eighty days] * * * and to make such other orders as may be appropriate." The case might have been different had the statute provided for an administrative hearing and determination and an administrative order suspending a strike, with the judicial role limited to enforcement of any permissible order. But Congress having chosen to refer the whole problem to a court of equity exercising its normal historic jurisdiction, the court must consider in

[2] This provision as it appears in 50 U.S.C. App. § 468 is quoted in the majority opinion at page ——.

[3] This provision as it appears in 50 U.S.C. App. § 2071 is quoted in the majority opinion at page ——.

the normal fashion of equity whether injunctive relief will serve its intended purpose. Equity refrains from issuing orders which appear vain in that they seem unlikely to serve their intended purpose.

To put the matter somewhat differently, there is no legislative mandate that a court shall grant an injunction whenever a strike is imperiling national health or safety, though such peril is essential to jurisdiction. Rather, a court sitting in equity is called upon to balance all equitable considerations inherent in the statutory scheme or disclosed by the evidence in a given case. Under this analysis a primary and essential equitable consideration must be whether the underlying public purpose of the statute to promote and facilitate more effective bargaining would be served. Indeed, in my judgment some utility in accomplishing this primary purpose of the legislation should provide the principal equitable justification of injunctive relief.

Thus, a court, before issuing an injunction under Section 178 of Title 29, should satisfy itself that there is a reasonable basis for belief that a forced suspension of the strike will aid and accelerate the process of collective bargaining. In terms of the present case, has it been made to appear here that the parties are more likely to settle their dispute within the next eighty days if the strike is suspended for that period by court order than they are to accomplish this result while the strike continues?

Examining the pleadings and proof in the present record it appears that neither the government which seeks the injunction nor the steel companies whose employees are striking has shed any light on this critical question. Certainly there is no indication that violence or any other exacerbating conduct in the

course of the strike is creating a climate harmful to negotiation. There is no suggestion that any tension or hostility inimical to negotiation would be relieved or any impediment to settlement removed by a suspension of the strike. There is simply nothing before us which warrants a conclusion that the objective of more productive bargaining would be served by an injunction.

On the other hand there is evidence to the contrary. The question is necessarily one of judgment informed by experience with the course of this strike and the history of other similar situations. The parties have elected to try this case on affidavits. The affidavit of David J. McDonald, President of the defendant union is relevant here. He has deposed as follows:

> On the basis of the information available to me, I firmly believe that if the injunction which is anticipated by these companies should not be issued, a major stumbling block to the negotiation of a voluntary settlement of this dispute will be removed, and a settlement of the dispute will be achieved through the process of free collective bargaining. It is, of course, impossible to predict with certainty the time which will be required to reach such a settlement or what the terms of the settlement will be. I am certain, however, that the anticipation that the strike will be ended or interrupted by an injunction, has operated to remove the economic pressures which would otherwise be felt by both sides to reach a settlement, and that those pressures will operate to assure a settlement within a short period of time if the anticipation of an injunction is removed.
>
> My firm belief that the anticipation of an injunction has, in fact, prevented a settlement

> from occurring to date is supported by the views expressed by such impartial experts as George W. Taylor, the Chairman of the Board of Inquiry appointed by the President in this dispute, and former Chairman of the National War Labor Board and the Wage Stabilization Board, Nathan P. Feinsinger and W. Willard Wirtz, both former members of the National War Labor Board and both former Chairmen of the Wage Stabilization Board, in interviews published in the October 19, 1959, issue of U.S. News & World Report, and reproduced, in part, in Appendix B to this affidavit.

The above mentioned statement of George W. Taylor, Chairman of the Presidential Board of Inquiry for this strike and former Chairman of the National War Labor Board, upon this subject was published in question and answer form:

> Q. How do you feel about the Taft-Hartley machinery for handling big strikes?
>
> A. [Taylor] Everybody knows it's not adequate to handle those strikes. If the Taft Hartley procedures are meaningful, they should serve the same function as a strike that is, get people to modify their extreme positions. I don't think they have done that.

Also in the record is the statement of Nathan P. Feinsinger who has served on the National War Labor Board and the Wage Stabilization Board, and who was chairman of Presidential fact finding boards convened to inquire into the steel and meat packing strikes of 1946 and 1948. Speaking of the effect of Taft-Hartley injunctions, Mr. Feinsinger said:

> A study of the records shows that, in some cases, the injunction has merely stiffened the resistance of the unions. There is a traditional resistance of labor to the injunction as a strike

breaking device. I know of no case where an injunction, as such, cleared the atmosphere or expedited the settlement of a dispute.

It also merits mention, although the court below did not have this information, that the very day this case was argued to us both the President, who has invoked Taft-Hartley procedures in this case, and his Secretary of Labor issued public statements deprecating this procedure by injunction and expressing the view that it is not an effective aid in settling an industry wide strike. For the text of the President's statement, at his news conference of October 22nd, see New York Times, October 23, 1959, page 12.

In brief, the sources of information available to us indicate that there is real basis for apprehension that the granting of an injunction will remove existing and rapidly mounting economic pressure upon all parties to settle their differences quickly, and thus be hurtful to the statutory objective of promoting a strike settlement by bargaining. And this is not counterbalanced by any indication that an injunction will in any way advance the bargaining process. Yet, it is the burden of the government which seeks an injunction from a court of equity to show that this relief seems likely to serve its intended purpose.

In my view the only way to avoid the foregoing analysis and its result is to say that the statutory scheme makes it the duty of the court to grant an injunction to halt an industry wide strike on the petition of the government whenever it appears that the national safety or health is being jeopardized. That is a possible scheme. Perhaps it is a desirable scheme. But as I read the Taft-Hartley Act it is not the scheme of the statute. I think Congress undertook a limited intervention of government to aid col-

lective bargaining, and, therefore, that a court should not act absent some showing that it will be aiding a negotiated settlement. That is a sufficient reason for denying injunctive relief here.

Finally, under the authority granted in Section 178 of Title 29, to issue "such other orders as may be appropriate," and guided in part by the manifest will of Congress that the court promote a negotiated settlement, I think it is within the equitable power of the district court, while refusing to enjoin the strike, to require the parties to follow such procedures as under the terms of the statute would be mandatory after an injunction. In this respect I disagree with the view of the majority that such procedures as the statute requires after an injunction are legally impossible without one. If they are reasonable ways of facilitating the settlement of the strike to which the court is addressing itself, I think the court in its discretion may require the parties to follow them without more. Indeed, we have already done as much by ordering that the parties proceed with collective bargaining while staying the order directing that they resume production. Particularly, I would have the district court order the parties to engage in continuing and persistent bargaining, to accept the assistance of the Federal Mediation and Conciliation Service and the Presidential Board of Inquiry and, if settlement should not result within sixty days, to permit the National Labor Relations Board to take a secret ballot of the employees of each employer involved on the acceptance or rejection of their employer's final offer of settlement. This much and no more is in my view an appropriate exercise of equitable judgment and discretion in the circumstances of this case.

Appendix B

Sections 206–210 of the Labor Management Relations Act of 1947, 61 Stat. 155, as amended, 29 U.S.C. 176–180, provide as follows:

Sec. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon

writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., Title 29, Secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion

shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

U.S. GOVERNMENT PRINTING OFFICE 1959